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EXPRESS WARRANTIES.

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628. AN express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which the validity of the entire contract depends (*a*).

Express warranties generally.

Definition of an express warranty.

(*a*) This definition, which is reproduced from the previous editions of this work, is framed more with regard to the legal effect of a warranty than to its nature. A definition in the terms of the Marine Insurance Bill, 1899, seems preferable: *i.e.*, "An express warranty is a stipulation inserted in writing on the face of the contract by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts."

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These written stipulations either allege the existence of some fact or state of things at the time, or previous to the time, of making the policy: as, that the thing insured is neutral property, that the ship is of such a force, that she sailed on such a day, or was all well at such a time; or they undertake for the happening of future events, or the performing of future acts: as, that the ship shall sail on or before a given day, that she shall depart with convoy, that she shall be manned with such a complement of men, &c. (*b*).

Promissory and affirmative warranties.

In the former case Marshall terms the stipulation an affirmative, and in the latter a promissory warranty; but the distinction between the two classes is one rather of form than substance, many warranties that are in form affirmative being in fact also promissory, as *e.g.*, the warranty that the ship is neutral not only affirms that she is so at the date of the policy, but also engages that, as far as depends on the assured, she shall continue neutral throughout the duration of the risk.

Express warranties must be written on the face of the policy.

629. It is a fixed and long-established rule that nothing can amount to an express warranty—*i.e.*, to an explicit condition, on the literal truth of which the validity of the contract depends—unless it be inserted in writing on the face of the policy (*c*).

For instance, a written paper stating that the ship "mounts twelve guns and twenty men" was held not to be an express warranty to that effect, though it was wrapped up with, and enclosed in, the policy when brought to the underwriters for subscription (*d*); and the decision was the same with regard

(*b*) 1 Marshall, Ins. 353.

(*c*) According to the Marine Insurance Bill, 1899, s. 36 (2), "An express warranty must be included in or written upon the policy, or must be contained in some document incorporated by reference into the policy."

(*d*) Pawson *v.* Barnevelt (1779), 1 Dougl. 12, n.; accord. Higginson *v.* Dall (1816), 13 Mass. 96. It was recently held by the Court of Appeal that parol evidence could be given to connect a document with the envelope in which it was sent, and that the two together formed one memorandum within the meaning of the Statute of Frauds. Pearce *v.* Gardner, [1897] 1 Q. B. 688; cf. Boydell *v.* Drummond (1809), 11

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to a similar paper, even though wafered to the policy at the time of subscribing (*e*). It is, however, now the regular practice of those engaged in the business of insurance to have clauses containing warranties printed on slips of paper, which are fastened with gum to the policy; and it is submitted that, in view of this practice, the ruling in Bize *v.* Fletcher would not now be followed (*f*).

No matter whereabouts.

But although it is absolutely essential that an express warranty should be written somewhere or other on the face of the policy, yet it need not be in the body or printed part of the policy; it may be in the margin or at the foot, and written either in the usual way or transversely (*g*). There are cases, however, in which, by distinct reference in the policy, a document which is extrinsic to it will be considered as incorporated with the contract, and its literal fulfilment be as strictly enforced as though it were actually inserted in writing on the face of the instrument (*h*).

Or referred to in the policy.

Whether a rule of a mutual insurance association, incorporated into the policy, amounts to a warranty depends on the nature of the rule. A rule that ships were not to sail from certain ports within certain dates was held to be a

East, 142. In Edwards *v.* Aberayron Mutual Ship Ins. Society (1876), 1 Q. B. D. 563, Pollock, B., and Brett, J., expressed the view that parol evidence is admissible to show what documents were intended by the parties to form one contract of insurance. *Ibid.* pp. 586, 588.

(*e*) Bize *v.* Fletcher (1779), 1 Dougl. 12, n.; followed in Goddard *v.* East Texas Fire Ins. Co. (1886), 67 Texas, 69; 60 American R. 1.

(*f*) See Lord Halsbury's judgment in Bensaude *v.* Thames and Mersey Mar. Ins. Co., [1897] A. C. 612. In Goddard *v.* East Texas Fire Ins. Co., *supra*, the Supreme Court of Texas held that a slip fastened with gum to a fire policy did not form part of the policy.

(*g*) Kenyon *v.* Berthon (1778), 1 Dougl. 12, n.; Blackhurst *v.* Cockell (1789), 3 T. R. 360.

(*h*) Pettigrew *v.* Pringle (1832), 3 B. & Ad. 314; Graham *v.* Barras (1834), 5 B. & Ad. 1011. The rule was established in the older cases of Routledge *v.* Burrell (1789), 1 H. Bl. 255, and Wood *v.* Worsley (1795), 2 H. Bl. 574, and 6 T. R. 710; *S. C.*, which were cases on fire policies. *Quære*, whether a clause of warranty indorsed on the back of the policy, unless signed by the initials of the parties, or referred to in the body of the instrument, would be operative. 1 Duer, 176. See, as to a condition on the back of a steamer ticket, Henderson *v.* Stevenson (1875), L. R. 2 H. of L. (Sc.) 470.

Sect. 629. warranty; while in the same case the Court said that another rule, providing that a vessel beaching before or after a specified time was not entitled to recover for any subsequent loss until surveyed and reported sufficient, was an exception (*i*).

"Warranted" sometimes denotes an exception.

630. The fact that the word "warranted" is used in a policy does not always prove that the term to which it refers amounts to a warranty. Thus, the clause "warranted free from particular average" is not a warranty; if it were, the result of a trifling particular average loss would be to avoid the insurance. It is an exception from the risk undertaken by the underwriter.

No peculiar form of words requisite for a warranty.

No particular form of words is requisite to constitute an express warranty: the word "warranty" or "warranted," for instance, is in no case necessary. The words "to sail on such a day," or "in port," or "all well" on such a day, or "carrying so many guns and so many men," &c., if written in the body, at the foot, or on the margin of the policy, would amount to an express warranty as much as any formal clause (*k*).

Nor special clauses.

In some cases, indeed, it is not even requisite that there should be any explicit clause of warranty at all; for instance, the mere description in the policy of the thing insured as being of a certain nation, as "a Danish brig," "the Swedish ship 'Sophia,'" &c., will amount to an express warranty that the thing insured has the national character thus ascribed to it in the policy. Thus, where a policy was effected "on goods on board the 'Mount Vernon,' an American ship," it was held that this description of the ship contained a warranty that she was an American ship, and therefore induced a necessity of her being documented, as American ships were bound to be by the treaties then subsisting between the United States and France (*l*).

(*i*) Colledge *v.* Harty (1851), 6 Ex. 205; 20 L. J. Ex. 146. See also Harrison *v.* Douglas (1835), 3 A. & E. 396.

(*k*) Kenyon *v.* Berthon (1778), 1 Dougl. 12.

(*l*) Baring *v.* Claggett (1802), 3 B. & P. 201; *S. C.*, Baring *v.* Christie (1804), 5 East, 398; Lothian *v.* Henderson (1803), 3 B. & P. 499. And

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Attempt to carry this to extremes.

An attempt was made to push this doctrine to extremes by contending that the mere fact of describing the ship in the policy by an English name, as the "Three Sisters" instead of the "Tres Hermanas," or the "Mark Anthony" instead of the "Marco Antonio," was a warranty that the ship was English; but Lord Ellenborough held decisively that no warranty of nationality could be inferred from the language in which the ship's name was expressed in the policy (*m*).

That a strained construction must not be put on a statement in a policy, so as to make it a warranty, also appears from another decision of Lord Ellenborough's, where the insurance was expressed to be "on the cargo being 1,031 hogsheads of wine," that this was not a warranty that the whole cargo was wine, and that no other goods would be taken on board (*n*). So, also, calling a vessel "the good ship A.," in a time policy, is not a warranty of seaworthiness (*o*).

Decision in the United States as to statement of national character.

631. It appears to have been decided in the United States that the mere allegation of a fact in the policy is not a warranty, where it is clear, from the terms of the policy itself, that the fact alleged can, in the particular case, have no relation to the risk. In a policy "on the good British brig called the 'John'" against sea risks only, this mere description of the ship as British was held not to be a warranty that she was such, because the fact of her being British could not, on such a policy, have affected the underwriter's judgment of the risk (*p*).

Phillips considers this distinction well taken, if rigorously confined to cases where it plainly appears that the fact alleged could not possibly, in the opinion of any man, have

see the cases in the United States, 1 Phillips, Ins. s. 757, *in notis*.

(*m*) Clapham *v.* Cologan (1813), 3 Camp. 382. See also Dent *v.* Smith (1869), L. R. 4 Q. B. 414.

(*n*) Muller *v.* Thompson (1811), 2 Camp. 610.

(*o*) Small *v.* Gibson (1850), 16 Q. B. 141, 157.

(*p*) Mackie *v.* Pleasants (1810), 2 Binn. 363, cited 1 Phillips, s. 758.

Sect. 631. any relation to the risks insured against in the particular policy (*q*).

These cases must, however, be of exceedingly rare occurrence, and, on the whole, it appears better to avoid entering in any case into the question of the materiality of the fact alleged, both because it is a departure from what has hitherto been regarded as a fixed principle of decision with regard to Warranties as distinct from Representations; and, secondly, because it calls upon the Court and jury to decide upon a point most difficult to be ascertained, viz., the impossibility of the underwriter's having been influenced by the fact thus impliedly alleged. Who, for instance, in the very case cited, would take upon himself to say that the underwriter might not have been more inclined to insure a British ship against sea-risks than one of any other national character? It therefore seems better to discard this distinction, and to lay it down generally, that every allegation contained in the policy, whether direct or indirect, of the national character of the thing insured amounts to a warranty, and as such must be literally fulfilled.

An express warranty requires an exact and literal fulfilment.

632. The first great distinction, then, between an express warranty and a representation is, that the former is always, and the latter never, written on the face of the policy; the second main distinction between them is, that while a representation may be satisfied with a substantial and equitable compliance, a warranty requires a strict and literal fulfilment, *i.e.*, what it avers must be literally true; what it promises must be exactly performed.

Every policy, in fact, in which an express warranty is inserted is a conditional contract, to be binding if the warranty be literally complied with, but not otherwise. Arnould's opinion, founded on the view expressed by some learned judges, was that any failure in such literal compliance avoids the policy *ab initio* (*r*). In the language of Lord Mansfield,

(*q*) 1 Phillips, Ins. s. 758.
(*r*) 2nd ed. p. 629. See further on this point, *post*, s. 634.

"The contract depends on the event taking place. There is no latitude, no equity; the only question is, has that event happened?" (*s*). "The warranty in a contract of insurance," says his Lordship in another place, "is a condition or a contingency, and unless that be performed there is no contract" (*t*). Sect. 632.

Hence all inquiry into the materiality or immateriality to the risk of the thing warranted is entirely precluded; and so are all questions as to a substantial compliance with the warranty. "It is perfectly immaterial," says Lord Mansfield, "for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with." "The very meaning," says Ashurst, J., "of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally so" (*t*). "It is a clear and first principle of insurance law," says Lord Eldon, "that when a thing is warranted to be of a particular nature or description, it must be exactly what it is stated to be. It is no matter whether material or not; the only question is, is this the thing *de facto* I have signed?" (*u*). And no inquiry can be made into its materiality or immateriality.

633. Hence, although the loss may not have been in the remotest degree connected with the breach of the warranty, the underwriter is none the less discharged on that account from all liability for the loss if the warranty have been in fact broken. Breach and loss need not be connected.

Thus, where a ship warranted to sail with convoy had in fact sailed without it and went down in a storm, the underwriter was held not liable for this loss (*x*).

Even where the warranty relates to a period antecedent to the commencement of the risk under the policy, and the breach of warranty is remedied before the ship sails on the voyage insured, it will be equally fatal.

(*s*) In Hibbert *v.* Pigou (1783), 1 Marshall, Ins. 375.

(*t*) In De Hahn *v.* Hartley (1786), 1 T. R. 345, 346.

(*u*) Per Lord Eldon, in Newcastle Fire Ins. Co. *v.* Macmorran (1815), 3 Dow, 255.

(*x*) Hibbert *v.* Pigou (1783), 1 Marshall, Ins. 375; 2 Park, Ins. 696.

Sect. 633.

De Hahn v. Hartley.

A ship was insured on a slaving voyage "at and from Africa to her port or ports of discharge in the British West Indies," and a memorandum was inserted in the margin of the policy that the ship had "sailed from Liverpool with fourteen six-pounders, swivels, small arms, and fifty hands or upwards, copper sheathed:" it appeared that the ship had actually sailed from Liverpool with only forty-six men instead of fifty, but that within twelve hours of leaving Liverpool she had taken on board at Beaumaris six additional hands; and express evidence was also given that the ship, between Liverpool and Beaumaris, was quite as safe with forty-six men as she could have been with fifty. The Court unanimously held that it was an express warranty; that it had been broken by the ship sailing from Liverpool with only forty-six men, and therefore that the policy was void *in toto* (z).

Whether fulfilment of the express warranty is in all cases a condition precedent to a claim under the policy.

634. It has been made a question in the United States whether an express warranty is in all cases a condition precedent, so that its breach will always avoid the policy *ab initio;* or whether it has this effect only when it relates to the commencement of the risk (*a*).

Phillips inclines to the latter opinion, and thinks that where the warranty relates to a circumstance necessarily subsequent to the commencement of the risk, as that the ship shall take on board a certain armament at an intermediate port, the assured would be entitled to recover for an antecedent loss though the warranty should not be complied with (*b*).

Arnould controverts this opinion in the following words:— "It appears to me, however, although the point has never presented itself for direct adjudication in the English Courts, that this opinion is inconsistent with the spirit of the English decisions. It seems quite clear that the parties might, if they

(z) De Hahn *v.* Hartley (1786), 1 T. R. 343; affirmed in the Exch. Ch. (1787), 2 T. R. 186, n.

(*a*) Hendricks *v.* Comm. Ins. Co. (1811), 8 Johns. R. 1; Taylor *v.* Lowell (1807), 3 Mass. R. 337, 340, 347. See 1 Phillips, ss. 764, 771.

(*b*) See 1 Phillips, ss. 764, 771. Phillips states this opinion positively as a rule of law derived from the American authorities.

pleased, expressly stipulate that the contract between them should be void *in toto*, as well upon the non-performance of some promised act, as upon the non-existence of some alleged event; and the only question is, whether in expressly inserting into the policy an executory stipulation, they have or have not done it with the intent that the efficacy of the contract, and consequently the liability of the underwriter, shall entirely depend on the stipulation being exactly complied with. It seems to me that they must be taken to have done so, and therefore that the subsequent breach of a warranty, promising that a given thing shall take place, as completely avoids the policy *ab initio* as the cotemporaneous falsehood of a warranty affirming that a given thing does exist or has existed." Sect. 634.

Lord Mansfield's view, according to his opinions already quoted (*c*), seems to agree with Arnould's. The editors, however, submit that the American rule is more reasonable, and that it is quite consistent with the nature of a warranty. Thus, if a ship insured "at and from" a port sails in an unseaworthy state, this breach of the implied warranty of seaworthiness does not avoid the policy as regards her stay in port (*d*). If the view of the English text-writers be correct, the consequences might in some cases be extraordinary. Thus, if a ship were insured at and from a port, warranted to sail before a given day, before which she sustained damage at the port which made her unseaworthy, and the necessary repairs detained her beyond that day, the assured could not recover for the loss; for the fact that the delay was caused by the consequences of a peril insured against would make no difference (*e*). There is no actual decision that a breach of an express warranty subsequent to the attachment of the risk avoids the insurance *in toto*, and it is submitted that the point is still an open one (*f*).

(*c*) *Ante*, s. 632. Marshall also agrees with this view. 1 Marshall, Ins. 355.

(*d*) Annen *v.* Woodman (1810), 3 Taunt. 299.

(*e*) Hore *v.* Whitmore, *post*, s. 635.

(*f*) The cases *post*, ss. 1249, 1250, as to apportionment of the premium in case of such a breach, seem more consistent with this view than with Arnould's. The Marine Insurance Bill, 1899, s. 34 (3), provided that the insurer might avoid the insurance as from the date of the breach of a warranty, but without prejudice to any

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Nothing excuses non-compliance.

635. No cause, however sufficient; no motive, however good; no necessity, however irresistible, will excuse non-compliance with an express warranty. Even the direct and irresistible operation of a peril expressly insured against in the policy is no excuse for non-compliance: thus, where a ship warranted to sail on a given day was prevented from doing so by an embargo laid on by a British governor, this breach of the express warranty was held to avoid the policy, although such embargo came expressly within the words "restraints and detainments of kings, princes, and people," &c., which were perils expressly insured against in the policy (*g*).

Possible exceptions.

636. The only conceivable cases in which compliance with an express warranty might be excused would be—1. If the state of things contemplated by the warranty were to cease; or, 2. If a subsequent law should render compliance with a warranty illegal (*h*).

Thus, if during war a warranty to sail with convoy at a future time from some foreign station were inserted, the intervention of peace before the period at which the ship was so to sail would doubtless be held to excuse the necessity of compliance; for it would be only fair to presume that the parties, when they inserted such a condition into the policy,

liability incurred by him before such date.

(*g*) Hore *v.* Whitmore (1778), 2 Cowp. 784; 2 Park, 669. The case of Havelock *v.* Hancill (1789), 3 T. R. 277, which is cited by Phillips (vol. i. s. 770) in support of the contrary view, is not in reality inconsistent with the statement in the text. It only decides that when there is a warranty that the ship shall be employed in a lawful trade, this means employed in a lawful trade by her owners. See *post*, s. 637; and see Mr. Arthur Cohen's note in the Law Quarterly Review, April, 1895, vol. xi. p. 119. According to the declaration in Hore *v.* Whitmore, as reported by Cowper, the ship was "warranted to sail on or before the 26th of July, 1776, free from capture and from all restraints and detainments of kings, &c." It would seem, therefore, that capture, restraints of kings, &c., were not perils insured against, but perils excepted, as is said by Phillips (vol. i. s. 772). As, however, the loss for which the assured was suing was a loss by capture, it seems clear that the report is inaccurate, and that the insurance was *against* and not *free from* capture, &c.

(*h*) See the Marine Insurance Bill, 1899, s. 35 (1).

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contemplated the continuance of that state of things which alone led to its insertion. The principle here is *cessante ratione, cessat lex* (*i*).

It is an old principle of law, that if a man covenants to do a thing which is lawful at the time, but an Act of Parliament comes in and hinders him from doing it, the covenant is repealed (*k*). "The same rule," said Arnould (*l*), "extends to warranties; and it may be stated generally, that compliance with a warranty will be dispensed with if it be rendered unlawful by a law enacted since the time of making the policy. If, however, a compliance with the warranty was unlawful at the time of making the policy, the contract was then void on the ground of the illegality."

Phillips (*m*) also states, on the authority of Brewster *v.* Kitchin, that compliance with a warranty is dispensed with, if made unlawful by subsequent legislation. Mr. Arthur Cohen, however, points out (*n*) that Brewster *v.* Kitchin by no means decides the point; it merely shows that the performance of a stipulation or promise is dispensed with, if it be rendered unlawful by subsequent legislation; and it has no application to a condition. "Indeed, it is clear on principle and authority," he says, "that where a contract is made subject to a condition, and compliance with a condition is rendered unlawful by subsequent legislation, the result is to make the contract itself voidable" (*o*). Performance of a warranty in a marine policy is not a stipulation for the breach of which an action lies, but a condition precedent to the liability of the underwriter. It is therefore submitted, in accordance with Mr. Cohen's contention, that the rule stated by Arnould and Phillips cannot be supported.

(*i*) See Duer on Representations, 89, 90; 1 Phillips, s. 424; 1 Parsons, 341.

(*k*) Brewster *v.* Kitchin (1698), 1 Ld. Raym. 321; *S. C.*, reported as Brewster *v.* Kitchell, 1 Salk. 198.

(*l*) 2nd ed. p. 633.

(*m*) 1 Phillips, s. 769.

(*n*) Law Quarterly Review, April, 1895, vol. xi. p. 118.

(*o*) Mr. Cohen cites, in support of this statement, Comyns' Digest, Condition D. (3); Davis *v.* Cary (1850), 15 Q. B. 418; Brown *v.* Mayor of London (1861), 30 L. J. C. P. 230; Pollock on Contracts, 6th ed. pp. 415—419.

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Construction of a warranty by mercantile usage.

637. A warranty, like every other part of the contract, is to be construed according to the understanding of merchants. It must be construed, said Lord Esher, "according to its ordinary acceptance among the class between whom the documents passed, unless by usage it has acquired a wider or narrower interpretation among men of that class." "The same broad rules of construction," said Bowen, L. J., "apply to the interpretation of a warranty as apply to all commercial documents" (*p*). Thus, a warranty does not bind the assured beyond the commercial import of the words, but it binds him to their full extent. This principle is illustrated by the following cases:—

Hart *v.* Standard Mar. Ins. Co. "Iron" includes steel.

Where a policy on ship contained a clause "warranted no iron . . . . exceeding the net registered tonnage," the Court of Appeal held that "iron" included steel, the intention being to exclude a class of cargo having certain physical qualities. The Court therefore decided that the policy was rendered void by the shipping of a quantity of steel in excess of such tonnage (*q*).

Meaning of "seaman." Bean *v.* Stupart.

Again, a warranty that the ship insured should carry "thirty seamen, besides passengers," was held to be satisfied although only twenty-six mariners had signed the ship's register, and, to make up the number thirty, the plaintiff reckoned the steward, cook, surgeon, some boys, &c.; evidence being given that boys are included under the term seamen by mercantile usage, and the jury being of opinion that the word seamen in this policy meant persons employed in navigation as distinct from passengers (*r*).

Meaning of "uninsured." General Ins. Co. of Trieste *v.* Cory.

A policy contained a warranty that the vessel should not be insured beyond a certain amount. Mathew, J., held that the warranty was not broken by the owner taking out a new policy to cover the probable deficiency upon a policy effected with an underwriter who had become insolvent, although

(*p*) Hart *v.* Standard Marine Ins. Co. (1889), 22 Q. B. D. 499—501.

(*q*) *Ibid.*

(*r*) Bean *v.* Stupart (1778), 1 Dougl. 11.

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thereby the total nominal insurance exceeded the amount limited in the warranty (*s*).

Roddick *v.* Indemnity Mut. Ins. Co

A policy on "hull and machinery" contained the proviso, "5,000*l.* warranted uninsured," and the question was whether the assured had broken this warranty by effected "p.p.i." or "honour" policies on disbursements. Kennedy, J., held that such policies, although void at law, were an infringement of the warranty (*t*). "The main, if not the whole, object of the warranty," said the learned judge, "is to give the insurer a pledge of the good faith of the assured, and of his diligence in preserving the thing assured by reason of his remaining his own underwriter to the extent specified in the warranty. . . . . Looking alike at the obvious aim of such a warranty as this and the fair meaning of the word 'uninsured' in a commercial document of this kind, as it must be taken to have been understood both by assurer and assured by the light of their common knowledge of the universal treatment of an 'honour' policy in the insurance world, I am of opinion that the clause ought to be construed as a warranty by the plaintiff that as to 5,000*l.* he was not covered by any such insurance as is treated in practice and according to the usage of commercial men as an effectual insurance." The learned judge, however, held that the policies on disbursements did not cover the subject-matter of the policy on "hull and machinery," and therefore did not infringe the warranty. On this ground his decision was affirmed in the Court of Appeal (*u*), where both Lord Esher and Smith, L. J., expressly reserved their opinion on the point whether the warranty could be infringed by an insurance which is a nullity at law.

(*s*) General Ins. Co. of Trieste *v.* Cory, [1897] 1 Q. B. 335. A time policy on a tug was expressed to be void if she was insured for more than 350,000 dollars. The policy did not cover navigation outside of certain limits. The tug went on a voyage outside these limits, and a policy was taken out to supplement her insurances, which were for the full amount. It was held that the warranty was not broken. St. Paul Fire & Marine Ins. Co. *v.* Knickerbocker (1899), 93 F. 931.

(*t*) Roddick *v.* Indemnity Mutual Mar. Ins. Co., [1895] 1 Q. B. 836.

(*u*) [1895] 2 Q. B. 380.

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"Lawful trade." Havelock v. Hancill.

637. In the case of a ship insured "in any lawful trade," it has been held that the words "lawful trade" must be confined to the trade on which the ship was sent by her owners, and therefore that the assured, who had sent her on a lawful voyage, was not precluded from recovering for a loss occasioned by her being barratrously employed by the master in a smuggling trade (v).

A warranty does not extend to anything not necessarily inferred from its terms. Hyde v. Bruce.

638. Although, on the one hand, the literal fulfilment of a warranty is strictly required, yet, on the other, it is no less certain that nothing beyond a bare and literal fulfilment can be required. A warranty will not be extended by construction to include anything not necessarily implied in its terms. Thus, where there was a warranty "that the ship should have twenty guns," and it appeared that, although in fact the ship had twenty guns, yet she had only twenty-five men, a number quite short of the necessary complement for twenty guns, Lord Mansfield held that this warranty did not imply that she should carry a competent number of men to work the guns; and therefore, as there was no ground to impute fraud, that the warranty had been sufficiently complied with (x).

Enumeration of different kinds of warranties impossible.

639. It would be idle to attempt an enumeration of all the different kinds of stipulation, which the varying exigencies of commerce may induce parties to introduce into contracts of insurance. We will therefore only discuss some of the most important ones. In the United States, from the great number of their ports and the great variety of their tribunals, the decisions upon the effect of such occasional clauses and

(v) Havelock v. Hancill (1789), 3 T. R. 277. Barratry was a peril expressly insured against by the policy; but that would have been of no avail in case the Court had held that there had been a breach of the warranty. Hore v. Whitmore (1778), 2 Cowp. 784; *ante*, s. 635.

(x) Hyde v. Bruce (1782), 3 Dougl. 213; 1 Marshall, Ins. 354. It may be questioned whether such a warranty would now be construed in a manner which might make it useless. The tendency in the recent cases cited above is to consider, in construing a warranty, the object which the parties had in view.

peculiar stipulations have been proportionally numerous, and may be found collected by the indefatigable industry of Phillips (*y*). Sect. 639.

Warranties which restrict the navigation of a ship to certain geographical limits, or exclude certain voyages or localities, either entirely or at certain periods, are frequently inserted in time policies (*z*). Warranties prohibiting navigation within certain limits.

Such warranties are often contained in rules of the mutual insurance associations, expressly incorporated in the policies of the associations. Thus, one of the rules of such an association was as follows: "Ships not to sail from any port to any port in the Belts between the 20th of December and 15th of February." The Court held, first, that this was a warranty, not an exception; secondly, that the word "to" meant "towards," according to its general construction in sea policies, bills of lading, &c., and that therefore, as the vessel had left Newcastle-on-Tyne on the 8th of February for a port in the Belts, the warranty was infringed, though she never arrived there (*a*).

The two following cases may also be cited with reference to the construction of warranties excluding certain geographical limits:—

A policy contained the following warranty: "Not allowed under this policy to enter the Gulf of St. Lawrence before the 25th day of April, nor to be in the said Gulf after the 15th day of November; nor to proceed to Newfoundland after the 1st day of December or before the 15th day of March without payment of additional premium and leave first obtained." The ship left Montreal for Newfoundland on the 16th of November, and on the 1st of December she was lost in the Gulf of St. Lawrence. It was contended for the

(*y*) 1 Phillips, Ins. c. ix. s. 9.

(*z*) A warranty not to use a certain river was recently held in the United States to be broken when the ship insured came to a buoy near the entrance of the river with the intention of entering it, was driven about, and anchored a mile from the river, where she was lost. Thames and Mersey Marine Ins. Co. *v.* O'Connell (1898), 86 F. 150.

(*a*) Colledge *v.* Harty (1851), 6 Exch. 205; 20 L. J. Ex. 146.

Sect. 639. assured that the first part of the warranty had no application to a voyage to Newfoundland, and that as the ship had sailed before the 1st of December he could recover. The Privy Council, however, held that the true construction of the warranty was, that the vessel was neither to be in the Gulf of St. Lawrence after the 15th of November nor to proceed to Newfoundland from any port after the 1st of December. This is obviously the ordinary meaning of the words of the warranty (*b*).

A time policy contained the clause: "Warranted no St. Lawrence between the 1st October and the 1st April." The Court of Session in Scotland held that the warranty applied only to the river of that name, and not also to the gulf, on the grounds (1) that the warranty was ambiguous; (2) that no usage had been proved by which to construe it; (3) that a penal clause was to be construed *contra proferentes*. Lord Craighill dissented, saying that "No St. Lawrence," from the comprehensive use of the negative, meant, according to the natural import of the words, neither river nor gulf. With this dissenting judgment the editors respectfully agree (*c*).

The limit of the Port of London for ships clearing outwards is at Gravesend; if, therefore, goods should be warranted as having been, or to be, exported from London on or before a given day, such warranty would not be satisfied unless the ship had cleared out at Gravesend on or before the day (*d*).

Warranty of safety at a particular time and place.

Warranty that ship is "well" on a given day. Blackhurst v. Cockell.

640. In order to protect himself from liability for any loss before a given day, the underwriter frequently causes a warranty to be inserted in the policy that the ship was "all safe," or "well," on the day. The following case will sufficiently show the operation of this warranty.

Goods were insured "lost or not lost," and at the foot of

(*b*) Provincial Ins. Co. of Canada v. Leduc (1874), L. R. 6 P. C. 224.

(*c*) Dryer v. Birrell (1883), 10 Ct. of Sess. Cas. (4th Ser.), 585.

(*d*) So decided on a license to export. Williams v. Marshall (1815), 6 Taunt. 390; 2 Marsh. R. 292; see also 2 Park, Ins. 692, 693.

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the policy was written "warranted well December 9th, 1784;" the policy was subscribed by the defendant between one and three o'clock in the afternoon of the day named in the warranty, and the ship had been lost at eight o'clock the same morning. "We are all of opinion," said Lord Kenyon, delivering the judgment of the Court, "that if the ship were well at any time on that day it is sufficient, and that the defendant is consequently liable" (*e*).

"In port" on a given day. Kenyon *v.* Berthon.

A warranty that the ship was "in port" on a given day is construed in the same way. Where the following words were written transversely on the margin of a policy, "in port 20th July, 1776," Lord Mansfield held, that this was a warranty that the ship should be in port on that day; and therefore, as it was proved that the ship had sailed on the 18th of July, he held the policy void (*f*).

Where a policy was effected on a ship against fire for one month, on the terms that she should be "safe moored in Portsmouth Harbour" during the time, Lord Ellenborough held, that this policy was not avoided by the ship's being moved from one part of the harbour to another for the more convenient purpose of repairs and taking in her cargo, she having been safely moored at every part of the harbour she was so moved to (*g*).

Distinction between time and voyage policies. Colby *v.* Hunter.

In a time policy, where the *terminus a quo* is not mentioned, but the insurance is intended to cover the ship on any voyage during the time, the warranty that the ship is "in port" will be satisfied by the ship's being in any port on the day specified. But in policies "at and from" a given terminus, the general words "in port" must be construed as referring to the port where, under the policy, the voyage is made to commence, and the warranty will not be satisfied unless the ship was in that port on the specified day. Thus, where a ship

(*e*) Blackhurst *v.* Cockell (1789), 3 T. R. 360.

(*f*) Kenyon *v.* Berthon (1778), 1 Dougl. 12, n. On the question when a ship is "in port," see Hunter *v.* Northern Mar. Ins. Co. (1888), 13 App. Cas. 717.

(*g*) Clarke *v.* Westmore (1807), cited in Selw. N. P. 939, 13th ed.

Sect. 640. was insured "at and from Hamburg to Vigo," with a warranty that she was "in port on the 19th October, 1825," and it appeared that the ship on that day was in the port of Cuxhaven, ninety miles below Hamburg, and also on the river Elbe, but without the limits of the port of Hamburg, Lord Tenterden held that this was not a compliance with the warranty: his Lordship remarked, that "if the assured had merely meant to stipulate that the ship was in port somewhere or other, as distinct from being at sea, on the day specified, he should, under such a form of policy, have warranted that the ship was 'all safe,' or 'well,' on the 19th of October" (*h*).

Warranty as to time of sailing.

641. One of the most important and most general of all express warranties is that which either alleges that the ship has sailed, or stipulates that she shall sail on, before, or after a given day.

Summer and winter risks.

In almost all voyages the year for the purposes of insurance is divided into two periods of time, all risks commencing within one portion of the year being called *winter*, or *out of season, risks*, and those commencing within the other being called *summer*, or *in season, risks*. Thus, for instance, in the West India trade, all risks commencing between the 12th of January and the 1st of August are called summer risks; those commencing between the 1st of August and the 12th of January winter risks. The amount of danger incurred in one of these periods is found by experience to be greater than in the other, and the amount of premium asked for insuring a winter risk is proportionately higher than for a summer risk.

When an insurance is effected "at and from" a port, the ship is protected during her stay at the port; in such policies it becomes additionally desirable for the underwriter to limit his responsibility by fixing some definite day after which he will not be liable unless the ship have actually sailed on her voyage (*i*). For these reasons, as well as upon the general

(*h*) Colby *v.* Hunter (1827), 1 Mood. & Malk. 81.

(*i*) Beckwith *v.* Sydebotham (1807), 1 Camp. 116.

principles already laid down, the Courts have been exceedingly rigorous in requiring the most exact and literal fulfilment of the warranty to sail on, before, or after a given day. Thus, as we have already seen, even an irresistible force, though one of the perils insured against, will not excuse a non-compliance with this warranty, so as to enable the assured to recover for a loss happening after the day limited for sailing (*k*). Sect. 641.

To sail "after" a given day.

It may obviously be as important that the voyage should not be commenced till after the winter risk ends as that it should not be deferred until the winter risk commences. A stipulation, therefore, that the ship shall sail after a given day and before another day, must be complied with quite as strictly as a stipulation to sail on or before a given day. A ship insured "at and from Martinique to Havre de Grace, with liberty to touch at Guadaloupe," was "warranted to sail after the 12th of January, 1778, and on or before the 1st of August, 1778": the ship sailed from Martinique to Guadaloupe long before the 12th January, 1778, intending to return to Martinique; finding, however, a full cargo at Guadaloupe, she never did so, but sailed direct from that island for Havre. The policy was held void because the ship had sailed from Martinique before the 12th of January, contrary to the warranty (*l*).

Vezian *v.* Grant.

642. Where a ship is insured "at and from" an island, the whole island is considered as one *terminus a quo*, the ship under the word "at" is protected in coasting round the island from port to port, and is not considered as having sailed on her voyage till she has entirely cleared away from the island with the purpose of proceeding directly for the *terminus ad quem*. Hence where a ship, insured "at and from Jamaica to London," was warranted to sail "after the 12th of January, and on or before the 1st of August," and it appeared that the ship, directly she had finished her loading

Sailing from an island.

Cruickshank *v.* Janson.

(*k*) Hore *v.* Whitmore (1778), 2 Cowp. 784. See, as to this case, *ante*, s. 635.

(*l*) Vezian *v.* Grant (1779), 1 Marshall, Ins. 359; 2 Park, 670, 671.

Sect. 642. at Port Maria, in Jamaica, and before the 12th of January, sailed for Port Antonio, an accustomed rendezvous in the same island, intending to wait there for convoy, and was lost in going thither: it was held, that this sailing from port to port was not a sailing on the voyage within the meaning of the warranty, and therefore that, although before the 12th of January, it was no breach thereof (*m*).

Distinction between a warranty "to sail" and "to sail from" or "to depart from" a terminus.

643. Considerable nicety has been shown in determining, under the varying circumstances of different cases, whether a warranty to sail has been complied with; and the Courts have put a different interpretation on a general warranty "to sail" (without more), and on a warranty "to sail from," or "to depart from," a named terminus.

Construction of a general warranty "to sail."

First, with regard to the general warranty "to sail" on or before a given day, the general principle established by the cases is this: if a ship, so warranted "to sail," quits her moorings on or before the day limited in the warranty, and, being then perfectly ready to proceed on her sea voyage, removes, though only to a short distance, with the *bonâ fide* intention of at once prosecuting such voyage, that is a sailing within the meaning of the warranty, although she may subsequently be detained till after the limited day by some unforeseen delay; if, on the other hand, the ship, at the time she quits her moorings and sets sail, is not in a state of complete preparation for her sea voyage, and is not *bonâ fide* intended to proceed directly and immediately upon it, this is not a compliance with the warranty. In short, in order to satisfy a general warranty to sail, there must be a *bonâ fide* commencement of the voyage insured on or before the given day.

Warranty "to sail" in a policy "at and from" a district.

644. If a ship, insured "at and from" an island or other district containing several ports, quits her moorings and sails from any one of such ports on or before the given day, in a state of complete readiness for her sea voyage, and with a

(*m*) Cruickshank *v.* Janson (1810), 2 Taunt. 301.

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real intention of proceeding directly upon it, her subsequent detention at another of such ports or on the coast of the island until after the given day will not amount to a breach of the warranty to sail, if such delay were accidental and unforeseen.

Unforeseen embargo. Bond v. Nutt.

The ship "Capel" was insured "lost or not lost at and from Jamaica to London, warranted to have sailed on or before the 1st of August." The ship, being completely laden and in every respect prepared for her voyage to London, sailed from St. Anne's Bay, on the north coast of the island of Jamaica, on the 26th of July, for Bluefields (an open road-stead on the south coast of the same island, and therefore out of the ship's direct course to England) in order to join convoy there; Bluefields being the general rendezvous appointed for convoy for all ships on the Jamaica station. She arrived at Bluefields on the 29th of July, expecting to find the convoy then ready there; the convoy, however, not being there, the ship was detained by an embargo, under order of the government, until the 6th of August, when she finally sailed with the convoy for England.

Lord Mansfield and the whole Court of King's Bench were of opinion that the voyage homewards had begun from St. Anne's, and, consequently, that the ship had sailed within the meaning of the warranty when she left St. Anne's Bay on the 26th of July (*n*). "The great distinction," Lord Mansfield said, "was this, that the ship sailed from St. Anne's for England by the way of Bluefields, and that it was not a voyage from St. Anne's to Bluefields with any object or view distinct from the voyage to England. If the captain," said his Lordship, "had gone first to Bluefields for any purpose independent of the voyage to England, to have taken in water or letters, or to have waited in hopes of convoy coming there, none being ready, that would have given it the condition of one voyage from St. Anne's to Bluefields and another from Bluefields to England" (*o*).

(*n*) Bond *v.* Nutt (1777), 2 Cowp. 601.

(*o*) See 2 Cowp. 608, 609. See an instance of this in the case of Cruickshank *v.* Janson (1810), 2 Taunt. 301.

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Warranty may be satisfied though ship has orders to call at another port for despatches

645. The true question, however, seems to be whether, at the time of sailing from the port of clearance, any delay was contemplated or intended at any other port or place in the island, which would be inconsistent with a direct voyage from the port of clearance to the *terminus ad quem:* if no such delay were contemplated or anticipated, an unexpected detention at such other port or place, beyond the day limited in the warranty, will not amount to a breach thereof, even though the captain, at the time of sailing from his port of clearance, had positive directions to pass by such port or place for the purpose of taking in letters or despatches.

Thellusson *v* Fergusson.

A French ship, insured "at and from Guadaloupe to Havre," and "warranted to sail on or before the 31st of December," sailed from Point à Pitre (her port of loading in Guadaloupe) on the 24th of October, being then completely loaded and provisioned, and duly cleared out for her voyage to France. The captain had by the greatest exertions sailed on the 24th in order to join a convoy which was advertised to sail on the 25th from Basseterre (a fort and open roadstead in Guadaloupe lying directly in the course of his voyage to France). A condition had been inserted in his clearance from Point à Pitre, that he should pass by Basseterre, in order there to take on such government orders or despatches as might then be ready for Europe. He swore at the trial that, when he sailed from Point à Pitre, he expected to find a convoy at Basseterre, and to proceed immediately with it on his voyage without any interruption; that had he arrived at Basseterre in the daytime, as he had expected to do, he did not mean to drop anchor there at all, but merely to send in his boat to take such despatches as might then be ready; arriving, however, at night, and too late for the expected convoy, that his ship, contrary to his anticipation, was detained at Basseterre by the orders of government till the 10th of January.

Upon this state of facts Lord Mansfield and the Court of King's Bench unanimously held, that, as the voyage had been *bonâ fide* commenced when the ship sailed from Point à Pitre

on the 24th of October, and was afterwards stopped by unforeseen accident at Basseterre, the warranty had been complied with by such sailing (*p*). Sect. 645.

Even where, at the time of sailing from his port of clearance, the captain knew of the embargo and sailed into it, but swore that he thought the embargo was only meant to prevent ships from departing without convoy, that he expected to meet with convoy on arriving at the place of rendezvous, and that the embargo would thereupon immediately cease and leave him to pursue his voyage the same day without interruption; the jury, believing this evidence, and that his departure from the port of clearance was not merely colourable in order to answer the letter of the insurance, but was in pursuance of a *bonâ fide* expectation to sail at once, gave a verdict for the plaintiff, which the Court, on motion for a new trial, refused to disturb; though they admitted that, if the captain on sailing from his port of clearance had expected and meant to wait for convoy, it would not have been a sailing on the voyage (*q*). Earle *v.* Harris.

646. When a vessel is insured "at and from" several or all of the West Indian Islands, with a warranty to sail on or before a given day, this warranty will be satisfied by her having sailed on her voyage from her last loading port in the islands on or before such day, and will not be broken by her proceeding to another of the islands to join convoy, and sailing with it thence after the day. Sailing to join convoy.

Under a policy "at and from Surinam and all or any of the West Indian Islands (except Jamaica) to London," with a warranty "to sail on or before the 1st of August," the ship sailed from Surinam, where she had cleared out, completely loaded and provisioned for the homeward voyage, before the day, and proceeded to Tortola (which was not out of her usual course to England, and the general rendezvous for Wright *v.* Shiffner.

(*p*) Thellusson *v.* Fergusson (1780), 1 Dougl. 361. See also Thellusson *v.* Staples, and Same *v.* Pigou (1780), 1 Dougl. 366, *in notis*.

(*q*) Earle *v.* Harris (1780), 1 Dougl. 357; Willes, J., however, dissented.

Sect. 646. convoy) in order to join convoy, with which she finally sailed thence after the day. The Court held, that the ship had satisfied her warranty by sailing from Surinam before the day. Lord Ellenborough intimated that, as Surinam was proved to have been the ship's final port of loading, the case was the same as though that place only had been mentioned in the policy as the *terminus a quo*, and one of the special jury stated that such was the construction universally put upon these policies in the City of London (*r*).

State of the ship which satisfies the warranty "to sail."

647. In all cases a warranty "to sail" means "to sail on the voyage insured," and nothing can amount to a compliance with this warranty, unless on or before the day the ship has broken ground in a state of perfect fitness and preparation for completing her sea voyage without requiring anything further to be done, and with the intention of at once prosecuting such voyage.

"It is clear," says Lord Tenterden, "that a warranty to sail, without the word 'from,' is not complied with by the vessel's raising her anchors, getting under sail, and moving onwards, unless at the time of the performance of these acts she has everything ready for the performance of the voyage, and such acts are done at the commencement of it, nothing remaining to be done afterwards" (*s*).

The following cases illustrate this rule:—

Ridsdale *v.* Newnham.

A policy "at and from Portneuf" (a place on the St. Lawrence about thirty miles above Quebec) "to London" contained a warranty "to sail on or before the 28th of October": on the 26th of October the ship dropped down the river from Portneuf, where she had completed her loading, to Quebec (the first place at which she could obtain her clearances), with a crew which, though sufficient for the river navigation, was not so for her sea voyage across the Atlantic. This was the usual mode of performing voyages

(*r*) Wright *v.* Shiffner (1809), 2 Camp. 247; *S. C.*, 11 East, 515.

(*s*) In Lang *v.* Anderdon (1824), 3 B. & Cr. 499. See also Thompson *v.* Gillespie (1855), 5 E. & B. 209.

from the upper parts of the St. Lawrence (*t*). She arrived at Quebec on the evening of the 28th, but did not complete her crew nor obtain her clearances at the Quebec custom-house till the 29th, and did not actually leave the port of Quebec till the 30th: this was held not to be a compliance with the warranty (*u*). Sect. 647.

A time policy was effected, subject to certain rules, one of which provided "that vessels should not sail to certain ports of British North America from ports in Ireland after the 1st of September;" and another (No. 9), "that the time of clearing at the custom-house should be deemed the time of sailing, provided the ship were then ready for sea." The plaintiff's ship, then lying in the Ballyshannon river under charter to sail to Miramichi, in New Brunswick (a port within the terms of the rule), was cleared at the Sligo custom-house on the 29th of August: at that time she had on board the whole of her stores and provisions, but only fifteen tons of ballast instead of fifty. The reason for this was to enable her to cross the bar of the river, which she could not have done with a greater weight of ballast; boats, however, were on the morning of the 1st of September waiting outside the bar of the river to complete the ballasting there, and this they might have accomplished before dark on the 1st. On that morning, however, the ship struck twice before she succeeded in crossing the bar; and the master, on getting outside, instead of then taking in his ballast, put across to Killybegs, on the other side of Donegal Bay, in order to see what damage the ship had sustained: she was not injured, and the ballasting was completed at Killybegs, but not till the 4th of September, and the ship did not finally sail till the 8th. The Pittegrew v. Pringle.

(*t*) See Ridsdale *v.* Shedden (1814), 4 Camp. 108.

(*u*) Ridsdale *v.* Newnham (1815), 4 Camp. 111; *S. C.*, 3 M. & S. 456. See, as to this case, the remarks of Willes, J., in Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37, 43, where it is stated that the *ratio decidendi* of the case was that the voyage did not commence till the vessel left Quebec. But it is clear that the voyage covered by the policy included the passage down the river from Portneuf. It is not easy to reconcile the decision with the principle laid down in Bouillon *v.* Lupton. See *post*, s. 648.

Sect. 647. Court on these facts held, first, that the warranty not to sail after the 1st of September had not been complied with; and, secondly, that the ship, at the time she cleared out at Sligo, was not ready for sea (*x*).

Graham *v.* Barras. In the next case on this subject the policy was also on time, and the ship was "warranted not to sail foreign" after the time limited in certain club rules. She was bound for the Bay of Fundy, from Dublin, and the last day for sailing, by the club rules, was the 1st of September; by another rule (No. 9) it was declared that the time of clearing at the custom-house should be deemed the time of sailing, provided the ship was then ready for sea. On the 31st of August the ship, then lying in St. George's Dock, Dublin, was cleared out at the Dublin custom-house: at that time, although all her crew were engaged, she had not on board a sufficient complement of men for the sea voyage. Early in the morning of the 1st of September the ship, with the same incompetent crew on board, dropped down the river Liffey to the Pigeon Hole, a place within the Port of Dublin, where she lay at anchor the rest of that day. In the course of that day the whole crew came on board; but, the wind being unfavourable, the ship did not sail from the Pigeon Hole and quit the Port of Dublin till the morning of the 2nd of September.

Upon this state of facts the Court held, first, that the warranty not to sail after the 1st of September was not satisfied, because on that day, after arriving at the Pigeon Hole, the ship remained stationary and did not proceed to sea; secondly, supposing the 9th rule to be incorporated by reference into the policy, that the ship was not ready for sea on the 31st of August, when she cleared at the custom-house, as she had not then a full crew on board (*y*).

(*x*) Pittegrew *v.* Pringle (1832), 3 B. & Ad. 514. It is doubtful whether this case is not open to the same criticism as that which the editors have ventured to apply to Ridsdale *v.* Newnham, *supra*.

(*y*) Graham *v.* Barras (1834), 5 B. & Ad. 1011. With regard to the construction of the ninth rule, "The time of clearing at the custom-house to be deemed the time of sailing, provided the ship is then ready for sea," the whole Court, with the exception of Littledale, J., held, that

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Warranty "to sail" on a voyage in stages.

648. When, however, a voyage consists of different parts, such as a river and a sea voyage, and the usual course of navigation is to perform them with different crews or equipments, the warranty only requires the vessel to sail on the earlier stage in the condition in which that part of the voyage is usually performed.

A ship, warranted to sail on a voyage from Lyons to Galatz on or before the 15th of August, left Lyons on the 24th of July fully equipped for her river voyage, but with only a river captain and crew, and without her masts, anchors, and other parts of her tackle necessary for the sea voyage; this being the usual course of navigation. She took on board her sea captain and some of her sea crew at Arles, and completed her crew and equipment at Marseilles, whence she sailed on the 23rd of August. The Court of Common Pleas held that she had complied with the warranty (*z*).

Involuntary detention after the sea voyage has begun is of no effect.

649. If the ship had broken ground on her sea voyage, and once got fairly under sail for her place of destination, on or before the day limited in the warranty, though she may have gone ever so little a way, and she afterwards put back from stress of weather, or apprehension of an enemy in sight, or be stopped by an embargo, or be in any way afterwards detained, yet, as there was a beginning to sail on the voyage insured, on or before the day, the warranty will be held to have been complied with (*a*).

The ship must have broken ground.

650. The ship need not proceed to any distance on her sea voyage in order to comply with a general warranty to sail; yet she must have actually quitted her moorings and broken ground so as to have *bonâ fide* commenced such voyage on or before the specified day.

Nelson *v.* Salvador.

In a policy on sugars "at and from Tobago to London,"

the word "then" must be referred to the time of clearing.

(*z*) Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37.

(*a*) Per Lord Mansfield, in Bond *v.* Nutt (1777), 2 Cowp. 607. And see Thellusson *v.* Fergusson (1780), 1 Dougl. 364, cited *ibid.* 601; Earle *v.* Harris (1780), 1 Dougl. 357.

Sect. 650. there was a warranty that the ship should sail on or before the 10th of August: the ship took out her clearances for London, on the voyage insured, on the 9th of August; and on the 10th had finally completed her loading and got her passengers on board. The ship was at that time moored in Tobago Bay with a bower anchor and a stream anchor, and there was no impediment to her sailing but the wind. The stream anchor was, in fact, raised that day; some of the sails were set, and the vessel moved forward about thirty fathoms by heaving in that quantity of the cable of the bower anchor: when, however, they were about to heave the bower anchor the captain observed so heavy a swell setting into the bay that he desisted, being fearful, if he departed that day, that he should be lost in getting out. Next morning, the 11th, she got under weigh, and finally left the port, having had no communication with the shore after the morning of the 10th. Lord Tenterden held that this was not a compliance with the warranty (*b*).

There must be a *bonâ fide* commencement of the voyage.

651. Not only must the ship be actually moved from her moorings on the day named, but this must be done with the *bonâ fide* intention of forthwith prosecuting the voyage, and not merely and solely for the sake of complying with the warranty.

Cockrane *v.* Fisher.

A time policy contained a warranty that the ship should not sail for British North America after the 15th of August. On that day the ship was lying in a dock in Dublin Harbour, bound for Quebec, and it was impossible from the state of the wind to go to sea; but the vessel was hauled out of dock and warped down the river about half a mile towards the mouth of the harbour. At the time when the vessel was thus moved the master and crew knew that it was impossible to get to sea on that day. It was held, that if the master's intention in moving the vessel was solely to comply with the warranty, his proceeding was not a compliance therewith; but that if his intention was to put his vessel in a more

(*b*) Nelson *v.* Salvador (1829), Mood. & Malk. 309; *S. C.*, Dans. & Ll. 219.

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favourable situation for the prosecution of the voyage, the warranty was satisfied, even though the intention to comply therewith was part of his motive for moving the vessel. As the jury had not found what the captain's intention in fact was, the Court ordered a new trial on this point (*c*).

On the new trial the jury found that the master and crew intended to put themselves in a better position for the prosecution of the voyage, and not merely to fulfil the warranty; at the same time they found, that at the time when the ship quitted the dock they knew it was impossible to go to sea that day. On this verdict the Court of Exchequer gave judgment for the plaintiff; and the Court of Error confirmed their judgment, on the ground "that the facts clearly showed that the ship was in the prosecution of her voyage on the 15th of August, having on that day made a movement, though in the river, for the purpose of proceeding to sea, and over the sea to North America (*d*).

Sea Ins. Co. v. Blogg.

Similarly when the warranty is that the ship shall not sail before a certain day, and she quits her moorings before that day in a state of readiness for the voyage, the question whether the warranty has been broken depends on the purpose for which she was moved. Thus, where a policy was on goods in ships "sailing on or after the 1st of March," and the ship, being cleared and ready for sea, was moved 500 yards away from her loading berth at a late hour on the 29th of February, the master's only object being to keep his crew on board for an early start on the 1st, the Court of Appeal held that the ship had not sailed before the 1st of March (*e*).

Warranty "to depart."

652. We proceed now to notice those cases which have been decided on warranties "to depart" and "to sail from."

Moir v. Royal Exch. Ass. Co.

Under a policy "lost or not lost, at and from Memel to

(*c*) Cockrane *v.* Fisher (1834), 2 Cr. & M. 581; *S. C.*, 4 Tyr. 424.

(*d*) Cockrane *v.* Fisher, in error (1835), 1 Cr. M. & R. 809; *S. C.*, 5 Tyr. 496.

(*e*) Sea Ins. Co. *v.* Blogg, [1898] 2 Q. B. 398, C. A.

Sect. 652. her port of discharge in England, warranted to depart on or before the 15th of September," the "Neptunus," having completed her loading and cleared at the custom-house of Memel on the 9th of September, in a state of perfect readiness for her voyage, hove up her anchor and dropped down the river with the intention of at once proceeding to sea; a change of wind, however, obliged her to lie at a place in the river, still within the limits of the Port of Memel, until the 21st, when she finally got to sea. Lord Ellenborough, at the trial, although he admitted that the ship had sailed within the meaning of a general warranty "to sail," when she first broke ground on the homeward voyage, yet held that a warranty "to depart" required a different construction. "The intention of the insurers must have been," said his Lordship, "that the ship should be out of the Port of Memel and at sea by the given day; but she was still in the port, and therefore the warranty was not complied with" (*f*). The Court of King's Bench supported this ruling (*g*); and in another action on the same policy, in the Court of Common Pleas, the unanimous judgment of that Court was given the same way (*h*).

Warranty "to sail from."

653. It would seem that a warranty "to sail from" a named place must have precisely the same meaning as a warranty "to depart." In the following case this was admitted, the only question being as to what in mercantile usage were the limits of the port of departure with reference to ships of the burden of that insured.

Lang *v.* Anderdon.

A policy was effected on goods "by ship or ships" at and from Demerara to London, warranted to sail from Demerara on or before the 1st of August. Goods under this policy were shipped on board a vessel of small burden, then lying in the river of Demerara, opposite the town, such being the proper usual place of loading and clearing out for ships of

(*f*) Moir *v.* Royal Exch. Ass. Co. (1814), 4 Camp. 84.

(*g*) *S. C.* (1815), 3 M. & S. 461.

(*h*) *S. C.* (1815), 6 Taunt. 240, and 1 Marsh. R. 570.

her tonnage. On the 1st of August the ship had loaded, cleared, unmoored and dropped down the river to a place beyond its mouth. It appeared that although ships of small burden always load and clear out as and where this ship had done so, yet large vessels only take in part of their cargo there, and do not complete their loading or obtain their clearances until they get on the outside of a shoal which commences about three miles beyond the river mouth. The ship in question did not get to the outside of this shoal till the 3rd of August, soon after which she was lost. Abbott, C. J., and the Court of King's Bench held, upon this evidence, that as the ship on which the goods were actually loaded had dropped down the river beyond its mouth on the 1st of August, nothing further being then required to be done by a ship of her size before proceeding on her sea voyage, she must be considered as having "sailed from Demerara" on that day, within the meaning of the warranty (*i*). Sect. 653.

If, indeed, this had been the case of a large vessel, which would have been obliged, after dropping down the river on the 1st of August, to take in a further part of her cargo and obtain her clearances outside the shoal, his Lordship held that she would not only not have "sailed from Demerara" within the meaning of this warranty, but she would not even "have sailed" within the meaning of a general warranty "to sail" on or before the 1st of August.

On an insurance on ship "at and from New York to Quebec, during her stay there, and thence to the United Kingdom, the said ship being warranted to sail from Quebec on or before the 1st of November," the Court held, that the underwriters were liable for the loss of the ship while on the voyage between New York and Quebec, after the 1st of November: they held, in fact, that the warranty only applied to the part of the voyage between Quebec and England, not to the part between New York and Quebec (*k*). Baines v. Holland.

(*i*) Lang *v.* Anderdon (1824), 3 B. & Cr. 495.

(*k*) Baines *v.* Holland (1855), 10 Exch. 802; 24 L. J. Exch. 204.

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Warranty to sail with convoy.

654. In order to avoid running a dangerous risk in time of general war, it was very usual, while the state of war continued, to insert an express warranty in the policy, that the ship should sail or depart with convoy. This, like every other express warranty, was held to require a strict and literal compliance.

It does not appear necessary to state in detail the cases decided on the extinct Convoy Acts: the following is an enumeration of the five requisites established, by the authority of these cases, as being essential to a sailing with convoy:—(1) It must be with the regular convoy appointed by government (*l*); (2) from the place of rendezvous appointed by government (*m*); (3) it must be convoy for the voyage (*n*); (4) the ship insured must have sailing instructions (*o*); (5) she must depart with convoy, and continue with it till the end of the voyage unless separated by necessity (*p*).

Warranty of neutrality.

655. During the maritime wars that grew out of the French Revolution, it became important for underwriters to ascertain whether the ship or goods insured were liable to hostile capture; and to avoid this risk it came to be customary, where the assured wished to insure his property as neutral, for the underwriters to require him to warrant his ship or goods to be neutral property. This was usually effected by inserting in the policy the words "warranted neutral," or "warranted neutral property;" or sometimes, without any formal clause of warranty, by describing the

Its form.

(*l*) Hibbert *v.* Pigou (1783), 2 Park, 694, 700.

(*m*) Gordon *v.* Morley (1780), 2 Str. 1265; Warwick *v.* Scott (1814), 4 Camp. 62.

(*n*) It is, however, no breach of the warranty, when convoy is appointed for part only of the voyage, for the ship to pursue the remainder of the voyage alone: D'Eguino *v.* Bewicke (1795), 2 H. Bl. 551.

(*o*) If, however, she has put herself under convoy, and the master cannot obtain orders, the warranty is not broken: Vardon *v.* Wilmot (1744), 2 Park, 696, n.; Victorin *v.* Cleeve (1779), 2 Str. 1250; Webb *v.* Thompson (1797), 1 B. & P. 5; Anderson *v.* Pitcher (1800), 2 B. & P. 164.

(*p*) Lilly *v.* Ewer (1779), 1 Dougl. 72; Jefferey *v.* Legendra (1691), 3 Lev. 320; Carth. 216; 2 Park, 707.

ship or goods as of a neutral nation, as, "an American ship," "a Dane," "a Swedish brig," &c., which, as we have already seen, was held to have the same effect as any formal warranty of neutrality (*q*). Sect. 655.

656. The meaning of a warranty of neutrality is not only that the ship or goods are neutral-owned at the time the policy is effected, but that, as far as depends on the conduct of the assured or his agents, they shall be neutral for the purpose of being protected on the voyage; and therefore that the ship shall be navigated according to the law of nations, and also be furnished with all the documents and papers which are the evidences of neutrality, and of her observance of the regulations of those international treaties to which she is bound to conform (*r*). Meaning of a warranty of neutrality.

If, therefore, when the policy was effected, the ship or goods were not owned by persons either, politically speaking, the subjects of a neutral country or having the commercial character of subjects of such country, or if the ship were not at that time properly documented as a neutral ship, this is a breach *ab initio* of the warranty of neutrality (*s*): so also if, in the course of the voyage, the ship violate the laws of blockade, or resist the right of search, or in any other way conduct herself illegally as a neutral ship so as to forfeit her character of neutrality, this is equally a breach of warranty which frees the underwriter from all liability on the policy. Instances of breach.

The warranty of neutrality, however, only means "that things beyond the control of the assured stand so at the time, not that they shall continue so:" if, for instance, at the time the policy is made the property warranted neutral be really owned by neutrals, it will be no breach of warranty if these parties become belligerents by the subsequent breaking out Assured does not warrant anything beyond his control after beginning of risk.

(*q*) Baring *v.* Claggett (1802), 3 B. & P. 201; Lothian *v.* Henderson (1803), *ibid.* 499; Baring *v.* Christie (1804), 5 East, 398.

(*r*) 1 Marshall, Ins. 410; 1 Phillips, Ins. s. 783.

(*s*) Baring *v.* Claggett (1802), 3 B. & P. 201.

Sect. 656. of hostilities between the state of which they are subjects and another state. The assured warrants that the ship and cargo are neutral when the policy is effected; he does not warrant that they shall continue so at all events during the whole period of the risk. The risk of future war is undertaken by the underwriter on every policy (*t*). In fact, the assured only pledges himself that the neutrality of the ship during the risk shall not be forfeited by any acts or omissions of himself and his agents (*u*); he does not and cannot stipulate for the continuance of a state of neutrality over which he himself has no control.

Breaches of the warranty by want of neutral ownership.

657. All property warranted neutral must be at the commencement of the risk, and, as far as depends on the assured or his agents, must continue to be till the end of it, neutral-owned—that is, must belong to those who either by birth or domicil are for commercial purposes neutrals (*w*).

As we have elsewhere (*x*) discussed the question as to what constitutes neutrality for commercial purposes, it will be sufficient in this place shortly to recapitulate the principal points as to neutral ownership.

Domicil and trading in a neutral country constitute neutrality for commercial purposes.

The great principle is, that all men take their commercial character from the place of their domicil. "All persons who reside and carry on business in a country, reaping the advantages of its trade and contributing to its well-being, must, for the purposes of trade, be considered as belonging to that country" (*y*).

Tabbs *v.* Bendelack.

Thus, where a ship "warranted American" belonged at the time the policy was effected to a man who, though a native-born American, had married an Englishwoman, settled,

(*t*) Eden *v.* Parkinson (1781), 2 Dougl. 732 (*a*), the *S. P.* was ruled in Saloucci *v.* Johnson (1785), 1 Park, 169; 2 Park, 716, and confirmed in Tyson *v.* Gurney (1789), 3 T. R. 477. It would, however, be open to an underwriter, on the facts of Eden *v.* Parkinson, to resist the claim, not on the ground of any breach of the warranty of neutrality, but because the insurance was on enemy's property.

(*u*) Cf. Trinder *v.* Thames, &c. Ins. Co., [1898] 2 Q. B. 114, as to the acts of the shipowner and his servants, when there is no express warranty.

(*w*) Woolmer *v.* Muilman (1763), 1 W. Bl. 427; *S. C.*, 3 Burr. 1419.

(*x*) See Part I. Chap. V.

(*y*) Per Lord Kenyon in Tabbs *v.* Bendelack (1801), 4 Esp. 109.

and was carrying on business in England, where for the last year he had resided with his family without quitting it; the Court held that this ship, though documented as an American, was not in fact an American-owned ship within the true meaning of the warranty, or so as to be protected by the American flag (*z*). Sect. 657.

On the other hand, property belonging to the born subject of a belligerent state will be considered as neutral-owned, within the meaning of a warranty of neutrality, if its owner be residing and carrying on his trade in the neutral state at the time the policy was effected (*a*).

It has been solemnly decided, however, in the United States, and no doubt would be so held in this country, that a man cannot acquire a neutral character for the purposes of commercial protection, or so as to make his property neutral property, by leaving a hostile and establishing himself in a neutral country, *flagrante bello* (*b*). Immigration *flagrante bello*.

658. Wherever a man may reside and whatever political character he may have by birth, whether enemy, neutral or ally, yet if during war-time he keeps up a commercial establishment in a hostile country either alone or in partnership, all property connected with such commercial establishment is liable to hostile capture, and therefore not neutral within the meaning of a warranty of neutrality (*c*). Property connected with establishment in a hostile country.

If, however, he who carries on business both in the

(*z*) Tabbs *v.* Bendelack (1801), 4 Esp. 207; *S. C.*, 3 B. & P. 207, n. A strong case, as it appeared that the plaintiff had an *animus revertendi* to America in that very ship on the termination of her then voyage. See also Wilson *v.* Marryatt (1798), 8 T. R. 31; M'Connell *v.* Hector (1802), 3 B. & P. 113; The Indian Chief (1801), 3 C. Rob. 12; The Anna Catherina (1802), 4 C. Rob. 107; The President (1804), 5 C. Rob. 277.

(*a*) The Postilion, Hay & Marriott, 245; M'Connell *v.* Hector (1802), 3 B. & P. 113; The Emanuel, 1 C. Rob. 249; The Abo (1854), Spinks' Prize Cases, 42, 44.

(*b*) The Dos Hermanos (1817), 2 Wheaton, 76.

(*c*) The Vigilantia (1798), 1 C. Rob. 1; The Susa (1799), 2 C. Rob. 251; The Portland (1800), 3 C. Rob. 41. The rule is the same in the United States; see The San Jose Indiano (1814), 2 Gallison's R. 268; The Antonia Johanna (1816), 1 Wheaton, 159.

Sect. 658. belligerent and in the neutral country resides in the latter, then, whatever may be his national character by birth, his property connected with his trading establishment in the neutral country will be neutral for the purposes of protection against hostile capture, and therefore within the meaning of the warranty (*d*).

Property not wholly neutral-owned.

It has been decided in the United States, and apparently on sound principles of law, that under a warranty of neutrality the property must be wholly owned by neutrals, and therefore, if a belligerent be interested in any part thereof, though merely as *cestui que trust*, this falsifies the warranty (*e*).

It is not, however, requisite that the whole cargo should be neutral-owned, unless it be all protected by the policy which contains the warranty of neutrality (*f*).

Property in transit to a belligerent country.

659. If the property which is the subject of the insurance be *in transitu* or in course of consignment from a vendor to a vendee, it is not enough, in order to satisfy a warranty of neutrality, that the property be neutral-owned at the commencement of the transit; for if it be consigned by neutral owners to a hostile destination in pursuance of a contract made during war, it is liable to hostile capture while in transit. The English rule is, that neutral property going to be delivered in the belligerent country, and under a contract to become the property of the belligerent immediately on arrival, is to be considered as belligerent property unless the contract was made in time of peace and without any contemplation of war (*g*).

(*d*) The Portland (1800), 3 C. Rob. 41; The Herman (1802), 4 C. Rob. 228; The Jonge Klassina (1804), 5 C. Rob. 297.

(*e*) Murray *v.* United Ins. Co. (1801), 2 Johnson's Cases, 168, cited 1 Phillips, s. 790; and see also Calbreath *v.* Gracy (1805), 1 Washington C. C. R. 219; 1 Phillips, s. 788.

(*f*) Barker *v.* Blakes (1808), 9 East, 283. See *S. P.* in Livingston *v.* Maryland Ins. Co. (1810), 6 Cranch, 274, and Bayard *v.* Massachusetts Fire and Mar. Ins. Co. (1826), 4 Mason, 256; 1 Phillips, s. 789.

(*g*) The Sally (1795), 3 C. Rob. 300, n.; The Vrow Margaretha (1799), 1 C. Rob. 336; The Jan Frederick (1804), 5 C. Rob. 128.

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It was held to make no difference that it was agreed between the neutral consignor and the belligerent consignee that the goods shall be at the risk of the former until delivered (*h*). Such agreements were held to be fraudulent, as, if they could operate, they would cover all belligerent property while at sea, since the risk of capture would be laid alternately on the consignor or consignee according as the one or other happened to be neutral (*i*).

Goods in transit from a belligerent country.

On the other hand, it has been also held, though in apparent inconsistency with the principle of the last rule, that goods which are hostile owned at the commencement of the transit do not acquire a neutral character by a neutral destination; the principle assumed in this case being that property which has a hostile character at the commencement of the risk cannot change that character while it is *in transitu* so as to protect it from capture (*k*).

The rule, in short, was, that if either neutral goods were shipped with a hostile destination, or hostile goods with a neutral destination, by virtue of any contract made during war, both alike were, by the law of nations, as understood in this country before the Declaration of 1856, liable to hostile capture, and neither, therefore, were neutral within the meaning of a warranty of neutrality.

Want of neutral origin. Colonial produce.

660. It was also held, that if property warranted neutral consisted of colonial produce, it must be either of neutral origin, or last shipped for its destination from a neutral port. The produce of a belligerent colony, though owned by a neutral, was thus liable to hostile capture (*l*); and the same

(*h*) The Atlas (1801), 3 C. Rob. 299.

(*i*) The Courts in New York dissent from this rule altogether, and their Judges have declared it to be rather "a rule of political expediency than of international law": De Wolff *v.* New York Firemen's Ins. Co. (1822), 20 Johnson, R. 214; *S. C.*, in error (1823), 2 Cowen's R. 56. It should be stated, however, that Phillips lays down the law as in the text, merely stating this case, by the way, as existing: 1 Phillips, ss. 260, 791.

(*k*) The Sally (1795), 3 C. Rob. 300, n.; The Atlas (1801), *ibid.* 299; The Anna Catherina (1802), 4 C. Rob. 107, 113.

(*l*) The Phœnix (1803), 5 C. Rob. 20; per Lord Stowell, *ibid.* 167.

Sect. 660. consequence followed when it was contracted for by a neutral before, but in contemplation of, war (*m*); but when the produce was delivered before war, not having been contracted for in contemplation thereof, it was held to be neutral (*n*).

Colonial produce shipped from a neutral port.

If, however, the produce was owned by neutrals, and exported from the hostile colony to a neutral country, it was deemed neutral during its subsequent transit upon re-exportation, even to the mother country.

The question in such cases always was, whether there had been a *bonâ fide* importation into the neutral country, or whether the whole transportation from the colony to the mother country was one entire voyage. If such produce had been brought into the ports of a neutral country and there transhipped immediately on arrival, without being landed; this, especially in the absence of any distinct proof as to the hostile origin of such produce, was held enough to satisfy a warranty of neutrality (*o*). So, also, landing the produce and paying the duties upon it at the neutral port previous to its transhipment to the mother country, was held sufficient to legalize the transaction (*p*); but merely touching with such produce at the neutral port, and there paying a nominal duty, was not enough (*q*).

Want of proper documents and proofs of neutrality.

661. In order to be neutral within the meaning of the warranty, so as to be protected against hostile capture, the ship must be furnished with all those documents and proofs of the neutral character of herself and her cargo required to be on board, either by the general rules of the law of nations or by the regulation of international treaties.

The principal documents and proofs of neutrality which

(*m*) The Jan Frederick (1804), 5 C. Rob. 128. See also The Rendsborg (1802), 4 C. Rob. 121.

(*n*) The Vrow Anna Catherina (1804), 5 C. Rob. 161.

(*o*) See Berens *v.* Rucker (1761), 1 W. Bl. 313; The Polly (1800), 2 C. Rob. 361.

(*p*) The Polly (1800), 2 C. Rob. 361.

(*q*) The Essex, cited 5 C. Rob. 368; The Maria (1805), *ibid.* 365; The William (1806), *ibid.* 385.

the law of nations requires in every neutral ship are stated by Arnould to be the following:—(*r*) Sect. 661.

1. The flag: this is the most obvious badge of the national character of the ship, and by the law of nations she is liable as against herself to be considered as belonging to the nation so indicated (*s*). A ship warranted neutral must bear no other than a flag that was neutral at the commencement of the risk; and a ship warranted of any given national character must bear the flag of that and of no other nation. The flag.

2. The passport, sea-brief, sea-letter or pass: this is a certificate granted by authority of the neutral state, giving permission to the master of the ship to proceed on the voyage proposed, and declaring that while on such voyage the ship is under the protection of the neutral state (*t*). It is indispensable to the safety of a neutral ship (*u*); nor is any vessel permitted to disown the national character ascribed to her therein (*x*). Its form is frequently and variously given in the commercial treaties contracted between different states, and must therefore vary in each particular case. Usually it specifies the name and residence of the captain; the name, property, description, tonnage, and destination of the ship; the nature and quantity of the cargo; the place whence it comes; its destination, &c.; but no general rule can be laid down on these points. The passport or sea-letter. Its usual form.

3. The register or certificate of registry is also an important The register or certificate of registry.

(*r*) The papers carried on board vary to some extent according to the nationality of the ship. For a list of the documents which may be expected to be carried by ships of different states, see Professor Holland's official Manual of Naval Prize Law, 52—59.

(*s*) The Success (1812), 1 Dodson, 131; The Vrow Elizabeth (1803), 5 C. Rob. 2; The Industrie (1854), Spinks' Prize Cases, 54. It must be carefully borne in mind that it is only the ship which thus takes its national character from the flag or pass, not the goods: The Vreede Scholtys (1804), 5 C. Rob. 5, n.

(*t*) The Vigilantia (1798), 1 C. Rob. 13; The Vreede Scholtys (1804), 5 C. Rob. 5, n.

(*u*) 1 Marshall, Ins. 410, citing Hubner de la Saisie des Bâtiments neutres, Pt. ii. chap. 3, s. 10, vol. i. 242.

(*x*) The Vigilantia (1798), 1 C. Rob. 13. This does not apply to the goods: The Vrow Elizabeth (1803), 5 C. Rob. 2; The Vreede Scholtys (1804), *ibid.* 5, n.

Sect. 662. lawful prize, yet the warranty of neutrality was broken by her having sailed from London to Guernsey without a passport (*e*). "The ship," said Lord Kenyon, "under this warranty, was not only not to be liable to risks arising from her not being American property, but she was not to be liable to any inconvenience or impediment arising from her not being in the condition required by the treaty with France" (*e*).

Baring *v.* Claggett. The following case shows the strictness with which the Courts will exact a compliance with the letter of the treaty regulations. In this same treaty the sea-letter is required to express "the name and place of habitation of the master or commander." A ship "warranted American" had a sea-letter running as follows:—"Permission has been granted to George Dominic, master of the ship called the "Mount Vernon," of the town of Philadelphia, of the burden of," &c. The Court held that the name of the town in the sea-letter must necessarily, from its collocation, be referred to the ship and not to the master, and that the warranty of neutrality was consequently forfeited by the ship's not having a sea-letter as required by the treaty (*f*).

In the same case, as it appeared that the owner of the ship had not been naturalized in America, and his ship consequently had not acquired the privileges conferred upon registered ships of the United States by the American Navigation Act of 1792, the Court held that the ship on this ground also was not "American" within the meaning of the warranty (*g*).

(*e*) Rich *v.* Parker (1798), 2 Esp. 615; *S. C.*, 7 T. R. 705, 709.

(*f*) Baring *v.* Claggett (1802), 3 B. & P. 201 (before Lord Alvanley and the Court of C. P.), and *S. C.* in error (1804), 5 East, 398 (before Lord Ellenborough and the Court of K. B.).

(*g*) Baring *v.* Claggett (1802), 3 B. & P. 201. Kent, C. J., supposes that Lord Alvanley did not know of the Act of Congress of 1802, giving vessels not entitled to a register, but American owned, all the advantages of national protection: 1 Phillips, Ins. s. 813, n. He certainly did not; for Baring *v.* Claggett was only decided in 1802, and the ship which was the subject of the warranty had been captured six years before, in 1796.

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Want of documents required by occasional regulations.

663. Although it is requisite, to comply with a warranty of neutrality, that a ship should be furnished with all documents required by treaties between her own and other states, the same rule does not apply to those marine regulations and ordinances which foreign states make in time of war contrary or in addition to the law of nations. Questions of neutrality are to be decided by the general law of nations, subject only to such alterations and modifications therein as may have been introduced by treaties between the state to which the ship belongs and other powers. The warranty imposes no obligation on the neutral shipowner to furnish himself with every document that the belligerent powers may require by their own private ordinances, unsanctioned by international treaty, as evidences of neutrality. In no case, therefore, will the want of such documents amount to a forfeiture of his neutrality (*h*).

Engaging in privileged colonial or coasting trade of the enemy.

664. A warranty of neutrality implies that the ship shall be conducted on the voyage with strict regard to the rules of neutrality. If she be guilty of any conduct which by the rules of war renders her liable to hostile capture, this is a breach of the warranty.

Thus, engaging in the privileged colonial or coasting trade of the enemy—simulating or destroying papers—resisting the right of search—violating the laws of blockade—are all so many forfeitures of neutrality and breaches of the warranty. We will consider these in their order.

Rule of 1756.

By the law of nations, as interpreted in this country, the following rule (frequently called the Rule of 1756), has been firmly established as a principle of our laws of war. If during war neutral property be engaged in any branch of the colonial or coasting trade of the enemy, which is not open to foreigners in time of peace, such property loses its

(*h*) Mayne *v.* Walter (1782), before Lord Mansfield, 1 Marshall, Ins. 402. See also the remarks on that case, and Barzillay *v.* Lewis, *ibid.* 404, 405; Pollard *v.* Bell (1800), 8 T. R. 434; Bird *v.* Appleton (1800), *ibid.* 562; Price *v.* Bell (1801), 1 East, 663. See further, *post*, s. 684.

Sect. 664. character of neutrality and becomes liable to hostile capture (*i*).

This rule stands on two grounds: 1. That the neutral, by thus acting, interposes to relieve the enemy from the condition to which the other belligerent had reduced him, and to that extent deprives that belligerent of the advantage he had gained. 2. That the neutral employed in a trade, reserved by the enemy to his own subjects, identifies himself with that enemy, and assumes his character: in the words of Lord Mansfield, "If a neutral ship trades to a French colony with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked on as a French ship, and is liable to be taken" (*j*). This rule was uniformly acted upon by Lord Stowell throughout the whole course of the great maritime wars of the French Revolution, from 1792 to 1815.

Limitations of Rule of 1756.

665. The rule, however, is confined to trade directly between the enemy's colony and the mother country, and does not apply where the produce of a hostile colony is *bonâ fide* imported into a neutral country and thence re-exported into the mother country.

A cargo of Spanish colonial produce was imported from the Havannah in an American ship into the United States, and, after being landed and duties paid, was re-exported in the same ship into Spain; Lord Stowell held this to be a sufficient test of the *bona fides* of the transaction and that the trade was legalized (*k*). But merely touching at the neutral port and paying nominal duties there was not enough (*l*).

The question, in fact, in all cases is one of intent. Did the *animus importandi* terminate at the intermediate port or

(*i*) The rule is firmly established; see The Immanuel (1799), 2 C. Rob. 186; and see especially 1 Kent, Com. 81—86, which contains an able exposition of the whole doctrine, together with a reference to the American authorities.

(*j*) In Berens *v.* Rucker (1761), 1 W. Bl. 314. France being then at war with this country, "French" in this paragraph is equivalent to "belligerent."

(*k*) The Polly (1800), 2 C. Rob. 361.

(*l*) The Essex, cited 5 C. Rob. 368; The Maria (1805), *ibid.* 365.

look to an ulterior one? Was it, under the circumstances, a *bonâ fide* importation ending at the intermediate port, or a mere contrivance to cover the original scheme of the voyage to an ulterior port? This is the true principle of the cases (*m*). Sect. 665.

This rule was uniformly repudiated by the United States throughout the whole of the war of 1812—1814, but Chancellor Kent intimates the possibility, that if the United States were ever themselves to be engaged in a maritime war with an enemy who threw the whole of his colonial or coasting trade into the hands of enterprising neutrals, they might be induced to feel more sensibly than they had hitherto done the weight of the arguments of foreign jurists in favour of the policy and equity of the rule (*n*). This rule is not admitted by the United States.

666. Carrying simulated papers is a ground of capture and condemnation, and, if without leave expressly given in the policy, is a breach of the warranty of neutrality (*o*): this is so, even though it be impossible without such papers to carry on the proposed trade (*p*). Carrying simulated papers,

So, carrying suspicious papers has been held in the United States to be a breach of this warranty. Under a policy on goods "warranted American property," certain papers relating to a former shipment were concealed in a cask on board and were referred to in a letter written in sympathetic ink, or suspicious papers.

(*m*) Per Sir Wm. Grant in The William (1806), 5 C. Rob. 385.

(*n*) 1 Kent, Com. 84, 85. Phillips (vol. i. s. 278), after stating that his countrymen had suffered much under this rule in the English Courts, lays it down that such trade, opened to all neutrals indiscriminately, ought not to be treated as contraband except after official notice. As regards notice, the rule was well known. Besides, it is a fallacy to say that the trade is *opened*. It continues to be a privileged trade, and the neutrals that embark in it become the privileged traders of the belligerent. Even if a final abolition of this privilege were proclaimed, this being done under stress of war and for belligerent purposes, may, according to a rule of the Courts, be disregarded by the enemy. See The Dos Hermanos (1817), 2 Wheaton, 76; and *ante*, s. 95.

(*o*) See Horneyer *v.* Lushington (1812), 15 East, 46; Oswell *v.* Vigne (1812), *ibid.* 70; Bell *v.* Bromfield (1812), *ibid.* 364.

(*p*) See the cases in East last cited, which answer the doubt raised on this point by Sir J. Mansfield in Steel *v.* Lacy (1810), 3 Taunt. 285.

Sect. 666. and they were such altogether as to throw a mystery over the shipment—this was held to amount to a breach of the warranty (*q*).

Attempting to disguise belligerent goods as neutral.

So it has been held in the United States, and apparently on sound principles, that an attempt to disguise belligerent goods as neutral and carrying them as such with neutral cargo, is a breach of the warranty of neutrality and will avoid the policy as to the neutral cargo, though if the same goods had been taken on board as enemy's goods and so documented, the only effect would have been to expose them to confiscation (*r*).

Concealing papers.

Concealing papers, material for the proof or preservation of neutral character, justifies a hostile detention and carrying into port for adjudication, and on this ground it has been laid down in the United States by Marshall, C. J., that the concealment of the ship's papers will generally amount to a breach of the warranty of neutrality (*s*).

Spoliation or destruction of papers.

The spoliation or destruction of papers is a still more aggravated circumstance of suspicion, and may justify an inference that the ship or goods are enemy's property without further proof: it does not, however, in this country create an absolute presumption *juris* and *de jure* to that effect (*t*). And Lord Mansfield said that though throwing papers overboard was considered as a strong presumption of enemy's property, yet he had never known a condemnation on that ground only (*u*).

Enemy's goods in neutral ships and neutral goods in

667. Previous to the treaty of Paris of 1856 (*v*) it was an established rule of the law of nations, as acted upon in this country, that enemy's property carried on board neutral ships

(*q*) Carrere *v.* Union Ins. Co. (1813), 3 Harris & Johnson, 324, cited 1 Phillips, Ins. s. 809.

(*r*) Phœnix Ins. Co. *v.* Pratt (1810), 2 Binn. 308; Schwartz *v.* Ins. Co. of North America (1811), 3 Washington C. C. R. 117.

(*s*) Livingston *v.* Maryland Ins. Co. (1813), 7 Cranch, 536, cited 1 Phillips, s. 809.

(*t*) The Hunter (1815), 1 Dods. Adm. R. 480.

(*u*) Bernardi *v.* Motteux (1781), 2 Dougl. 581. The American rule is the same: The Pizarro (1817), 2 Wheaton, 227.

(*v*) See *post*, s. 672.

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in time of war is liable to capture and confiscation. It was not, however, held to involve a forfeiture of neutrality, either in the ship in which it was carried or in the cargo together with which it was loaded on board, if such cargo belonged to other owners and was covered by separate insurances (*x*).

enemy's ships no breach of neutrality.

Neutral goods are not liable to seizure on board enemy's vessels; and this on the same principle as regulates the case last considered, viz., that war gives a right to capture the goods of an enemy, but not of a friend. It would, therefore, be no ground of avoiding the policy that goods "warranted neutral" had been put on board an enemy's vessel: this, however, must be understood as confined to the enemy's merchant vessels, for if placed on board an armed ship of the enemy they are regarded as enemy's property; for this shows an intention to resist the right of search (*y*).

And the same consequence has been held to follow, for the same reason, if the ship on which they are loaded, though neutral, sails under convoy, or in company of an armed belligerent force, or under the licence of a hostile government (*z*): the doing so would clearly amount to a breach of the warranty of neutrality.

Violation of the laws of blockade.

668. It is an invariable principle of the Law of Nations, that if a neutral violates a blockade by carrying supplies to, or in any way trading with, a blockaded port, he is guilty of a high offence against the laws of war, and thereby subjects his ship to the penalty of confiscation (*a*), and also the cargo, unless it be proved that the owner thereof could not have intended to violate the blockade (*b*); and this penalty may

(*x*) See Barker *v.* Blakes (1808), 9 East, 383.

(*y*) The Fanny (1814), 1 Dodson's Adm. R. 443.

(*z*) *Ibid.* See also The Maria (1799), 1 C. Rob. 340.

(*a*) Bynkershoek, Quæst. Juris Publici, lib. i. c. 4, s. 11; Grotius de Jure Belli ac Pacis, lib. iii. c. 1, s. 5; Vattel, Droit des Gens, lib. iii. c. 7, s. 117.

(*b*) Baltazzi *v.* Ryder (1858), 12 Moo. P. C. C. 163. See also The Mercurius (1798), 1 C. Rob. 80, where Sir W. Scott stated the rule somewhat differently, viz., that the cargo was not liable to confiscation, unless the owners were or might have been cognizant of the blockade before they sent it.

Sect. 668. be enforced by seizure at any time during the continuance of the ship's voyage out and home, though long subsequent to the act of violation (*c*). We shall have occasion in a subsequent chapter to enter at some length into the question of what constitutes a violation of blockade (*d*); it will be sufficient here to lay it down as an undoubted rule, that any act which can be so construed will entail a forfeiture of neutral privileges, and be a breach of the warranty of neutrality.

Carrying hostile despatches.

669. Few modes of violating the rules of neutral conduct are of a more aggravated description than carrying hostile despatches, *i.e.*, communications made by the home government, or the spies of one of the belligerents, to its forces at the theatre of war, or *vice versâ*. Such conduct in all cases exposes to confiscation the neutral ship so employed, and if there be any connection between the owner of the ship and cargo, then (but not, it seems, otherwise) the cargo also (*e*); it is needless to add that it would amount to a breach of the warranty of neutrality.

Ambassadors' despatches not within the rule.

But this rule does not extend to the case of a neutral ship carrying the despatches of the ambassador of one of the belligerents from the neutral country to the sovereign of the belligerent state (*f*).

Carrying contraband of war.

670. As we shall have to consider the whole subject of contraband of war in treating hereafter of the illegality of the risks, we will here only observe that, as carrying contraband articles entails the confiscation of all property on board the neutral ship belonging to the same owner, it would clearly amount to a breach of the warranty of neutrality as to such property (*g*); with regard, however, to the ship and

(*c*) The Welvaart van Pillaw (1799), 2 C. Rob. 128; The Juffrow Maria Schroeder (1800), 3 C. Rob. 147.

(*d*) See Part II. Chap. 5, *post*.

(*e*) The Atalanta (1808), 6 C. Rob. 440.

(*f*) The Caroline (1808), *ibid.* 461.

(*g*) See Seymour *v.* London and Provincial Marine Ins. Co. (1872), 41 L. J. C. P. 193. In that case there was a warranty in a policy on goods against contraband. Some of the goods covered by the policy being contraband, it was held that the policy was void *in toto*.

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such portion of the cargo as belongs to different owners, it will only, it should seem, produce such a result when the circumstances of criminality are such as to involve both ship and cargo in one common penalty (*h*).

Resisting the right of search.

671. In order to enforce the rights of belligerent nations, and with a view to ascertain the real character of all vessels on the high seas, the Law of Nations arms the belligerents with the power of visitation and search.

If, upon making the search, the vessel be found employed in contraband trade, or (according to the rule acted upon in this country previous to the Treaty of Paris of 1856) in carrying enemy's property, or in carrying hostile despatches or troops, she is liable to be brought in for enquiry by a Court of Prize as to her conduct, or the national character of the cargo.

If either the ship herself, or the vessel under whose convoy she is sailing, resist this right of search when lawfully exercised, or attempt a rescue while being conducted into port for adjudication, such conduct amounts to a forfeiture of her neutrality, and exposes both ship and cargo, without distinction, to the penalties of confiscation (*i*).

The Armed Neutrality of 1780.

Several attempts have been made in European history to put an end to the exercise of this right of search, as far as it relates to the carriage of enemy's goods on board neutral ships; the most memorable of these was the Armed Neutrality of 1780—a league formed under the auspices of the Empress Catherine for the purpose of defending and propagating the principle "that free ships make free goods," and that the neutral flag should be a substitute for all other proof of nationality, and protect all goods carried under it, to the exclusion of the right of search.

England, considering this an attempt to introduce by force

(*h*) The Ringende Jacob (1798), 1 C. Rob. 89; The Bermuda (1865), 3 Wallace, 514.

(*i*) See Vattel, lib. iii. c. 7, s. 114; The Maria (1799), 1 C. Rob. 340. The convention between Russia and England, 17th June, 1801. In the United States, The Nereide (1815), 9 Cranch, 427; The Marianna Flora (1826), 11 Wheaton, 42.

Sect. 671. a new code of maritime law, perseveringly resisted it; and when, in the wars of the French Revolution, the Armed Neutrality re-appeared under the title of the Baltic Confederacy, she so vigorously and promptly opposed its pretensions, that the attempt was speedily abandoned, and the right of belligerent search was admitted even by Russia to the very fullest extent (*j*).

Declaration of Paris, 1856.

672. On the conclusion of the Crimean War, England concurred with France, Austria, Russia, Prussia, Sardinia and Turkey, in establishing the principle that free ships make free goods. The Declaration appended to the Treaty of Paris of 1856 is this:—

1. Privateering is and remains abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, except contraband of war, are not liable to capture under enemy's flag.
4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coasts of the enemy.

Most of the maritime States have formally adhered to this Declaration. The most important exceptions are the United States and Spain; but during the recent war between these Powers, both of them agreed to the exemption of enemy's goods in neutral ships from capture.

At present, therefore, it appears that the right of search, abolished as far as relates to enemy's property on board neutral ships as to States adhering to the Declaration of Paris, subsists as to the other points in respect to which it was formerly exercised—viz., the carriage of troops—hostile despatches—contraband of war.

Exposition of the doctrine of

673. The ablest and most eloquent exposition anywhere to be met with of the whole doctrine of the right of search is

(*j*) In the convention between England and Russia, 17th June, 1801, the latter admitted the right of search, even of merchant ships under convoy of a ship of war.

Sect. 673. search in the "Maria."

contained in the celebrated judgment of Lord Stowell, in the case of the "Maria" (*k*). The points established in it are thus expressed by that great master of law and language:—

1. The right of visiting and searching merchant ships on the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontrovertible right of the lawfully-commissioned cruisers of the belligerent nation.
2. The authority of the sovereign of the neutral country being interposed in any manner of mere force, cannot legally vary the rights of a lawfully-commissioned belligerent cruiser.
3. The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.

Resistance by convoy.

674. Agreeably to these principles Lord Stowell, in that case, pronounced sentence of condemnation on a whole fleet of Swedish ships sailing under convoy of a Swedish man-of-war under instructions to resist by force the right of search claimed by lawfully-commissioned British cruisers. The resistance of the convoying ship was held to be the resistance of the whole convoy, subjecting all to confiscation (*l*).

Sailing with convoy for the purpose of resistance.

The very act of sailing under the protection of a belligerent or neutral convoy for the purpose of resisting search is a violation of neutrality (*m*).

What the right of search includes.

The right of search includes that of sending a vessel into port for the more satisfactory examination of the national character of the property, in cases where there is a reasonable ground of doubt (*n*). It is therefore a breach of the warranty if the captain and crew of a neutral vessel, thus sent into port, attempt to rescue the vessel (*o*).

(*k*) (1799), 1 C. Rob. 340.

(*l*) The Maria (1799), 1 C. Rob. 340.

(*m*) *Ibid.* See the authorities collected as to this point, 1 Kent, Com. 155, n. (*b*) and (*c*), and 1 Phillips, Ins. s. 818.

(*n*) The Maria (1799), 1 C. Rob. 340.

(*o*) Garrels *v.* Kensington (1799), 8 T. R. 230; *S. P.* decided in the United States, Wilcocks *v.* Union

Sect. 674. Limitations upon right of search.

With regard to the limitations upon the exercise of the right of search, it must be observed that it can only be exercised—1stly, by ships of war or lawfully-commissioned cruisers of the belligerents; 2ndly, upon private merchant ships of the neutrals, and not in any case upon public ships of war; 3rdly, during the existence of war (*p*).

With regard to the mode of its exercise, it may be laid down generally that it must be conducted with due care and regard to the rights and safety of the vessel (*q*).

Effect of foreign judgments as proof of breach of warranty.

675. One of the means most frequently used for proving that the ship or goods warranted neutral had forfeited their neutrality was by producing the judgment or sentence of a competent Prize Court pronouncing their condemnation.

Copies of the sentence, properly authenticated and produced under the seal of the Court, were in such cases always deemed sufficient evidence of the fact of the condemnation, and of the ground on which it proceeded (*r*).

We will consider—First, what is to be deemed a Court of competent jurisdiction in questions of prize; secondly, when the sentence of such Court is to be deemed conclusive evidence of a breach of the warranty.

A competent Prize Court must be—

676. Whether a Court acting as a Prize Court has competent jurisdiction depends mainly upon the points—1, by whom it was held; 2, in whose dominions it was held; and 3, where the prize itself lay.

1. A Prize Court of the government of the captor.

1. The condemnation must be pronounced by a Prize Court of the Government of the captor; the Prize Court even of a co-belligerent has no jurisdiction.

2. Sitting in the territory either of the

2. As to place, it is established that although the Prize Court of the captor may sit in the territory of an ally, yet it

Ins. Co. (1809), 2 Binn. 574, cited 1 Phillips, Ins. s. 822. See also The Dispatch (1801), 3 C. Rob. 278.

(*p*) See The Maria, *sup.*; Le Louis, 2 Dods. Ad. R. 210.

(*q*) Thurlow's State Papers, vol. ii. p. 503. Mr. Canning's letter to Mr. Monroe, August 3rd, 1807, cited 1 Kent, Com. 156, n. (*a*).

(*r*) See cases cited in Marshall, Ins. vol. i. p. 393, vol. 2, p. 723, and the dicta of Lord Ellenborough in Flindt *v.* Atkyns (1811), 3 Camp. 215.

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captor or of an ally, but not of a neutral.

is not lawful for such a Court to act in the territory of a neutral (*s*), notwithstanding that the territory is in the military occupation of a belligerent, if the neutral Government still exists (*t*).

It is established that a Prize Court of the Government of the captors, whether sitting in its own territory or that of an ally, may lawfully pronounce sentence of condemnation on a captured ship brought into a port of the ally (*u*).

3. A Prize Court has jurisdiction over prizes lying in neutral or allied ports.

677.—3. It was for some time supposed that a Prize Court, though sitting in the country of the captors, had no jurisdiction over prizes lying in a neutral port, and Lord Stowell, in one case, seems to have acted on this principle (*x*). Subsequently, however, though he still admitted the correctness of the principle, yet he felt himself bound by the contrary practice which had so long a period prevailed, and acted upon the rule that the condemnation by a Court of the captors, sitting in the country of the captors, upon prizes carried into a neutral port and remaining there, is valid by the general usage of nations (*y*). On appeal his judgment was affirmed (*z*). During the Crimean War the question arose again in the case of some Russian ships which, being unfit to be brought here, were sold at Memel with the consent of the Prussian Government. Dr. Lushington, while condemning them under the circumstances, maintained the correctness of the principle that

(*s*) The Flad Oyen (1799), 1 C. Rob. 135; Havelock *v.* Rookwood (1799), 8 T. R. 268. The *S. P.* held in the United States, L'Invincible (1816), 1 Wheaton, 238; The Estrella (1819), 4 Wheaton, 298.

(*t*) Donaldson *v.* Thompson (1808), 1 Camp. 429; Hagedorn *v.* Bell (1813), 1 M. & S. 450.

(*u*) The Christopher (1799), 2 C. Rob. 209; The Betsey (1800), *ibid.* 210, n.; Oddy *v.* Bovill (1802), 2 East, 473, *S. P.*

(*x*) The Herstelder (1799), 1 C. Rob. 114, 119, n.

(*y*) The Henrick and Maria (1799), 4 C. Rob. 43; The Purissima Concepcion (1805), 6 C. Rob. 45, 47.

(*z*) The Henrick and Maria, on appeal (1807), 6 C. Rob. 138, n. This rule is adopted in the United States: Hudson *v.* Guestier (1808), 4 Cranch, 293; Williams *v.* Armroyd (1813), 7 Cranch, 423. This matter is discussed by Mr. Maclachlan (Merchant Shipping, p. 23) in a long note. The editors, however, do not agree with his observations as to the effect of Lord Stowell's decisions.

Sect. 677. a prize must be brought into a port of the captors' country (*a*). There can be no doubt, and, in fact, it has been so decided, that a belligerent Prize Court, sitting in its own country, has lawful jurisdiction to condemn as prize captured ships brought into the ports of an ally (*b*).

When the sentence of a foreign Prize Court is conclusive.

678. How far the sentences of foreign Prize Courts are to be conclusive evidence of a breach of the warranty of neutrality, is a question upon which considerable difference of opinion among the judges existed at one time.

"Since the judgment of the House of Lords in Lothian *v.* Henderson (1803), it may now be assumed," says Lord Ellenborough, "as the settled doctrine of a Court of English law, that all sentences of foreign Courts of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions on policies of insurance upon every subject immediately and properly within the jurisdiction of such foreign Courts, and upon which they have professed to decide judicially" (*c*).

Same rule in the United States.

This rule of the English law has been adopted in the federal Courts of the United States (*d*), and though there has been some difference of opinion in the State Courts on the point, yet the weight of judicial authority on the other side the Atlantic seems clearly to be in favour of the binding force and universal application of this doctrine of English law (*e*).

But not in France.

The law in France is different, and the French Courts,

(*a*) The Polka (1854), Spinks' Prize Cases, 57.

(*b*) The Christopher (1799), 2 C. Rob. 209.

(*c*) Bolton *v.* Gladstone (1804), 5 East, 155, 160. See the learned opinions delivered by Blackburn, J., in Castrique *v.* Imrie (1869), L. R. 4 H. L. 414, 425; Godard *v.* Gray (1870), L. R. 6 Q. B. 139, 147; Schibsby *v.* Westenholz (1870), *ibid.* 155. In Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 463, the Court of Appeal said that the cases in which the judgments of Prize Courts were held to be conclusive evidence of the fact that the ships were not neutral are exceptional cases, and have no application to judgments *in rem* in general.

(*d*) Croudson *v.* Leonard (1808), 4 Cranch, 434; Bradstreet *v.* The Neptune Ins. Co. (1839), 3 Sumner's R. 600.

(*e*) 2 Kent, Com. 121, n. (*a*).

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though they will enforce a foreign judgment in France, after subjecting to examination the grounds on which it proceeds, will not permit a foreign judgment, though pronounced by a competent Court, to be conclusive evidence in the French Courts of the facts as to which it decides (*f*).

The first English case in which this rule of international comity was established was that of Hughes *v.* Cornelius, in the year 1682 (*g*).

The rule was afterwards extended to the case of hostile tribunals, though many of the English judges, Lord Ellenborough in particular (*h*), have expressed their regret at this establishment and extension of the rule.

The doctrine, however, stands on too firm ground to be shaken, and it only remains to notice the somewhat perplexed decisions by which, under varying circumstances, the English Courts have sought to modify and apply it.

Limitations of the doctrine.

679. The proposition itself is: That the sentence of a foreign Prize Court is conclusive evidence in our Courts upon all points within its jurisdiction, and upon which the sentence, on the face of it, professes to decide, but upon none other.

Sentences only conclusive as to points upon which they profess to decide.

The chief point to be attended to is that these judgments are only conclusive as to the points upon which they profess to decide. It follows that, unless the sentence professes to be grounded on some fact or state of facts, which, by the law of nations, amounts to a forfeiture of neutrality; as, *e.g.*, that the ship was "enemy's property," or "was not properly documented according to treaties," the sentence is not conclusive evidence of a breach of the warranty of neutrality.

Grounds of condemnation may be

680. Formerly our Courts would not give a conclusive effect to facts merely set out in the preamble or reciting part

(*f*) Such seems to be the result of the French authorities, which, however, are very conflicting. See the very elaborate and learned note of Chancellor Kent, 2 Com. 121, n. (*a*).

(*g*) Carth. 32; T. Raym. 473; Shower, 143.

(*h*) Donaldson *v.* Thompson (1808), 1 Camp. 429. See also his remarks in Fisher *v.* Ogle (1808), *ibid.* 418.

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inferred from whole of sentence.

of these sentences as motives of the condemnation, but not expressly stated in the adjudicative clause as the ground of the sentence (*i*). Subsequently, however, a more liberal rule of interpretation prevailed, according to which, if it clearly appear by necessary inference from the whole of the sentence taken together what that ground was, and that it was incompatible with the neutrality of the condemned property, such sentence will be conclusive to falsify the warranty (*k*).

But that it may have this effect, the real ground upon which the sentence proceeded must be clearly deducible by plain inference from the whole taken together; and such ground must amount to a forfeiture of neutrality by the law of nations. If there be so much ambiguity as to make it impossible to ascertain the real ground on which the sentence proceeded, it is not conclusive (*l*).

The rule is thus laid down by Tindal, C. J.: "In order to conclude the parties from contesting the ground of condemnation in an English Court of Law, such ground must appear clearly on the face of the sentence; it must not be collected by inference only or left in uncertainty, whether the ship was condemned on one ground which would not be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country" (*m*).

Bernardi *v.* Motteux.

In an early case before Lord Mansfield, where a sentence of ambiguous construction stated on the face of it two facts as the basis of adjudication, one of which raised the inference

(*i*) Christie *v.* Secretan (1799), 8 T. R. 192.

(*k*) See Kindersley *v.* Chase (1801), 1 Marshall, Ins. 425; Bell *v.* Carstairs (1811), 14 East, 374, 392, 394; Bolton *v.* Gladstone (1804), 5 East, 155; *S. C.* (1809), 2 Taunt. 85; Baring *v.* Royal Exch. Ass. Co. (1804), 5 East, 99, overruling as to this point the N. Pr. decision of Lord Ellenborough in Fisher *v.* Ogle (1808), 1 Camp. 418, in which his Lordship decided that the sentence is evidence only of what it positively and specifically affirms in the adjudicative part of it, not of what may be gathered from it by way of inference.

(*l*) Bernardi *v.* Motteux (1781), 2 Dougl. 575; Calvert *v.* Bovill (1798), 7 T. R. 523; Fisher *v.* Ogle (1808), 1 Camp. 418; Dalgleish *v.* Hodgson (1831), 7 Bing. 495.

(*m*) Dalgleish *v.* Hodgson (1831), 7 Bing. 504.

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that the condemnation did not proceed on the ground of enemy's property, but on the ground of a non-compliance with the private ordinances of the condemning state, his Lordship permitted the plaintiff to show by collateral evidence, that the latter ground was that on which the foreign Court really proceeded (*n*).

Calvert *v.* Bovill.

So, in a case before Lord Kenyon and the Court of King's Bench, where the sentence of a French Prize Court condemned property, "warranted American," on three grounds, alleged in the preamble in such a way as to make it ambiguous on which the sentence really proceeded, and none of which was a just ground of condemnation by the law of nations; the Court held the sentence not conclusive to prove a forfeiture of neutrality (*o*).

Where the sentence merely condemned the ship as prize, without stating on the face of it any grounds of condemnation, Lord Mansfield in one case permitted the defendant to show, by collateral evidence, that it really proceeded on the ground of a violation of neutrality (*p*). In another case of the same kind, his Lordship held that the mere fact of condemnation by a competent Court, "as good and lawful prize," where no grounds were stated, was conclusive evidence of a breach of the warranty of neutrality (*q*). The authority of this case has however been doubted (*r*), and it does not seem to be reconcilable with the rule laid down as above by Tindal, C. J., in Dalgleish *v.* Hodgson.

Sentence conclusive though manifestly unjust.

681. If the sentence in the adjudicative part of it expressly condemns ship or goods on the ground of their being enemy's property, such sentence, though manifestly unjust,

(*n*) Bernardi *v.* Motteux (1781), 2 Dougl. 575.

(*o*) Calvert *v.* Bovill (1798), 7 T. R. 523.

(*p*) Fernandez *v.* Da Costa (1764), Beawes, 314; 1 Marshall, Ins. 398.

(*q*) Saloucci *v.* Woodmass (1784), 2 Park, Ins. 727; 1 Marshall, Ins. 405.

(*r*) 2 Smith's L. C. See also the remarks of Lawrence, J., on this case in Lothian *v.* Henderson (1803), 3 B. & P. 527, though it appears that the learned Judge approved of the decision.

Sect. 681. will be received as conclusive evidence to prove a breach of the warranty of neutrality.

Geyer *v.* Aguilar. An insurance was effected on the freight of a ship "warranted American property:" the ship, being captured by a French privateer, was condemned by the sentence of a French Prize Court, which, after reciting the fact that she had not a list of her crew on board conformably to the model annexed to the treaty of 1778 between France and the United States, proceeded as follows:—"The tribunal, therefore, adjudges the validity of the capture and confiscation of the ship and cargo, the whole being, for want of the captain's having the papers in due form, decreed to belong to the enemies of the Republic": the Court of King's Bench held this sentence to be conclusive evidence of a breach of the warranty. Lord Kenyon said, "The ground on which the French Court proceeded in this case was that this was a capture of enemy's property. Whether or not those Courts arrived at that conclusion by proper means I am not at liberty to inquire. Here the question is whether they have not stated, as the foundation of the condemnation, a ground which will bear them out supposing it to be true; and I am clearly satisfied that they have" (*s*).

Express declaration in sentence that property was enemy's is not necessary. **682.** Even though the foreign Court do not expressly declare in the adjudicative part of the sentence that the subject of condemnation was enemy's property; yet if it can be clearly collected from the whole of the sentence taken together that they must have proceeded on this ground, a breach of the warranty is established.

Kindersley *v.* Chase. Goods "warranted Swedish property" were, with the ship, seized and condemned by the Prize Court of the Isle of France, whose sentence, after stating the principal question to be "whether the ship and cargo were enemy's property or Swedish property," proceeded to set forth several insufficient

(*s*) Geyer *v.* Aguilar (1798), 7 T. R. 681; *S. P.* Hughes *v.* Cornelius (1682), Carth. 32; T. Raym. 473; 1 Shower, 143; *per cur.* Castrique *v.* Imrie (1861), in error, 30 L. J. C. P. 177, 184, 188.

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grounds of condemnation, and then, in the adjudicative clause of the sentence, referring to all that had preceded, used these words, "whereupon the Court declared the ship and cargo to be lawful prize." Sir William Grant, on appeal, giving judgment at the Cockpit in this case, decided that, as the French tribunal had considered the question whether the property was enemy's or neutral, and had then adjudged it to be lawful prize, this was sufficient evidence of a breach of the warranty, as they must have been supposed to have proceeded on the ground that it was enemy's property (*t*).

"The result of all the cases," said this very learned Judge, "is, that a sentence of a Court of Admiralty is conclusive as to all that it professes to decide. Now, is it possible to say that this Court did not profess to decide whether this was or was not enemy's property? It was the only question the Court did profess to decide" (*u*). Sir William Grant also in this case observed that it is generally to be presumed that such sentences proceed on legitimate grounds, which throws on the parties impeaching them the duty of showing that they have proceeded on some other grounds (*v*). In a recent case, however, the Court of Appeal said that the cases in which a sentence of a foreign Court has been held conclusive evidence of the fact that the vessel condemned was not neutral, are exceptional, and that they have no application to judgments *in rem* in general (*x*).

The presumption *primâ facie* is that such sentences have proceeded on lawful grounds.

683. As we have already seen, a neutral ship, in order to

Sentence on the ground

(*t*) Kindersley *v.* Chase, at the Cockpit, 22nd July, 1801, 1 Marshall, Ins. 425. See also Bolton *v.* Gladstone (1804), 5 East, 155, in error; (1809), 2 Taunt. 15, which proceeded on the same principle.

(*u*) Kindersley *v.* Chase, at the Cockpit, 22nd July, 1801, 1 Marshall, Ins. 425.

(*v*) 1 Marshall, Ins. 426, 427. See the effect of judgments and of judgments *in rem* considered, 2 Smith's L. C. See also the opinion of Blackburn, J., delivered in the House of Lords in Castrique *v.* Imrie (1870), L. R. 4 H. L. 414; and as to foreign judgments generally, the judgments of the same learned Judge in Godard *v.* Gray (1870), L. R. 6 Q. B. 139, and Schibsby *v.* Westenholz (1870), *ibid.* 155.

(*x*) Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 463.

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that ship not properly documented.

comply with a warranty of neutrality, must be provided with all the documents required by treaty (*y*). Hence, if a sentence of condemnation profess to be on the ground that the ship had not those evidences of neutrality on board, the warranty is deemed to have been broken (*z*).

Effect of sentence obviated by special agreement.

Lothian *v.* Henderson.

Nevertheless, although the ship be warranted in the policy to belong to a neutral state, this may be explained by a subsequent agreement, so as to preclude the effect of a foreign sentence of condemnation as enemy's property, where, in point of fact, the ship was neutral property. A ship was described in the policy as "an American vessel," and doubts having arisen whether this was not a warranty of neutrality, the underwriters signed a written paper, agreeing "that, in case of capture or seizure, the assured on producing papers to prove that the ship and cargo were really neutral should be entitled to his loss." The ship was captured and condemned as enemy's property, but the Court held that, though there was a warranty that the ship was American, yet the explanatory agreement coupled with proof of her neutrality prevented the sentence from establishing a breach of this warranty (*a*).

Sentence expressly on ground of breach of arbitrary regulation.

684. Although a ship cannot be neutral unless she is properly documented as required by treaties, the same consequence, as we have seen, does not follow from her mere failure to observe those arbitrary regulations, or ordinances of foreign states, which have not received the sanction of international law (*b*).

Thus, where a ship, "warranted Portuguese," was condemned by a French Prize Court expressly "because she had an English supercargo on board," contrary to a recent ordinance of the French government, but not contrary to the law of nations, or to any treaty between France and Portugal,

(*y*) *Ante*, s. 661.

(*z*) Barzillai *v.* Lewis (1782), 1 Marshall, Ins. 402; Baring *v.* Claggett (1802), 3 B. & P. 201. See the remarks of Lawrence, J., on the former case in Pollard *v.* Bell (1800), 8 T. R. 441, 442.

(*a*) Lothian *v.* Henderson (1803), 3 B. & P. 499.

(*b*) 1 Marshall, Ins. 401, 402.

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Lord Mansfield held that this sentence did not falsify the warranty (*c*). On the same ground, where a ship, "warranted Danish," was condemned by a French Prize Court on the express ground of her "captain's being an enemy," contrary to a French ordinance, set out in the sentence, the Court held that the sentence did not falsify the warranty (*d*). And in the case of Bird *v.* Appleton, the Court of King's Bench fully sustained their decision in Pollard *v.* Bell, and broadly laid down the principle that no one state has authority, by any ordinance of its own, to vary the general law of nations as to other states (*e*).

Sentence on grounds good in part.

685. If in a foreign sentence there be several grounds of condemnation set forth, and one of them be a good and legal ground, it will be conclusive to establish a breach of the warranty, though joined with several bad ones.

Baring *v.* Royal Exch. Ass. Co.

Thus, where a ship, "warranted American," was condemned by a French Prize Court, partly on the ground that she was not documented according to treaties, and partly for the breach of French ordinances, not binding upon America, the sentence was held conclusive to forfeit the warranty (*f*).

(*c*) Mayne *v.* Walter (1782), 1 Marshall, Ins. 402.

(*d*) Pollard *v.* Bell (1800), 8 T. R. 434.

(*e*) (1800), 8 T. R. 562. See also Price *v.* Bell, 1 East, 663; Bernardi *v.* Motteux (1781), 2 Dougl. 575, for the true effect of which decision, see 1 Marshall, Ins. 406, and per Lawrence, J., in Pollard *v.* Bell (1800), 8 T. R. 441.

(*f*) Baring *v.* Royal Exch. Ass. Co. (1804), 5 East, 99.

CHAPTER IV.

IMPLIED WARRANTIES.

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General doctrine of seaworthiness.

686. In every voyage policy there is an implied warranty that the ship shall be seaworthy for the voyage when she sails, by which is meant that she shall be in a fit state as to repairs, equipment, crew, and all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing on it (*a*).

There is nothing in the law of marine insurance more important to commerce and the preservation of human life than a strict compliance with this warranty (*b*). It is not implied, however, in time policies (*c*). In voyage policies it is

(*a*) *Per cur.* Dixon *v.* Sadler (1839), 5 M. & W. 405, 414.

(*b*) See the observations of Lord Eldon in Douglas *v.* Scougall (1816), 4 Dow, 276; and of Lord Redesdale in Wilkie *v.* Geddes (1815), 3 Dow, 60.

(*c*) Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284; *post*, s. 697.

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an implied condition precedent to the underwriter's liability for any loss incurred in the course of the voyage (*d*), and can only be excluded by terms in writing in the policy expressed in the clearest language. Therefore, when in a voyage policy losses from "rottenness, inherent defects, and other unseaworthiness" were excepted, the Privy Council held that the implied warranty of seaworthiness was not thereby excluded. Consequently, the boiler being defective at starting, the plaintiff did not recover, although the defect had been made good before the loss (*e*). So, also, where a policy on cattle provided that the fittings of the ship were to be approved by Lloyd's surveyor, and they were approved by him, Bigham, J., held that as regards the sufficiency of the fittings, the warranty of seaworthiness was not excluded by the express provision as to the approval of the fittings (*f*).

Seaworthiness of ship a condition precedent in voyage policies.

687. If, indeed, as in policies "at and from," the risk attaches before sailing, and the ship, while in the port, be in a state of seaworthiness commensurate with her then risk, her subsequently sailing in a state of unseaworthiness for the voyage will not avoid the policy *ab initio*, so as to entitle the assured to a return of premium (*g*); and in the same way, if she be lost in the course of a river navigation, the underwriters will be liable, provided her then state of equipment was adequate to her then risk, although it might not be such as to constitute a state of seaworthiness for her sea voyage (*h*).

Seaworthiness a relative term.

As Alderson, B., expressed it in the case of Gibson *v.* Small, "on a voyage policy 'from' a port, the ship must be able, if seaworthy, to sustain the ordinary risk on that voyage. If insured 'at and from,' the ship must be seaworthy 'at,' *i.e.*, sufficient for ordinary risks in port, and

(*d*) Per Lawrence, J., Christie *v.* Secretan (1799), 8 T. R. 198; per Lord Ellenborough, Wedderburn *v.* Bell (1807), 1 Camp. 2.

(*e*) Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234.

(*f*) Sleigh *v.* Tyser, [1900] 2 Q. B. 333.

(*g*) Annen *v.* Woodman (1810), 3 Taunt. 299.

(*h*) See *per cur.* in Dixon *v.* Sadler (1839), 5 M. & W. 405, 414; Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37; and see *post*, ss. 699—701.

Sect. 687. seaworthy 'from,' *i.e.*, fit for the voyage at the time of sailing" (*i*). "The term 'seaworthy,'" said Erle, J., on the same occasion, "when used in reference to marine insurance, does not describe absolutely any of the states which a ship may pass through, from the repairs of the hull in dock till it has reached the end of its voyage; but it expresses a relation between the state of the ship and the perils it has to meet in the situation it is in" (*j*).

Immaterial that unseaworthiness remedied before loss.

688. As seaworthiness is a condition of the contract of insurance, breach of the condition avoids the contract and deprives the assured of any recourse against the insurers, whether his loss can be traced to such breach or not, even though the unseaworthiness was remedied before the loss (*k*).

Ignorance of assured as to unseaworthiness immaterial.

Whether the assured were ignorant of the unseaworthiness of the ship or not also makes no difference; if the ship was not, in fact, seaworthy at the outset of the adventure, either in the degree commensurate with her then risk, or for the voyage, as the case may be, that state of things never existed which was the foundation for the underwriter's promise, and he consequently can never be bound thereby. Hence, as Lord Eldon says, "It is not necessary to inquire whether the owners acted honestly and fairly in the transaction; for it is clear law that, however just and honest the intentions of the owner may be, if he is mistaken in the fact, and the vessel is, in fact, not seaworthy, the underwriter is not liable" (*l*).

Thus, where the owner has procured his ship to be surveyed and fully repaired, as the shipbuilder thought, before sailing, but she proved to be unseaworthy from a latent defect (the unsoundness of some timbers near her keel), not discovered during the survey or repair, Lord Mansfield held the underwriter discharged from his liability by the mere fact of unseaworthiness (*m*).

(*i*) 4 H. L. Cas. 393.

(*j*) *Ibid.* 384.

(*k*) Forshaw *v.* Chabert (1821), 3 Brod. & B. 158; Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234.

(*l*) Per Lord Eldon in Douglas *v.* Scougall (1816), 4 Dow, 276.

(*m*) Lee *v.* Beach (1762), 1 Park, Ins. 468; see also The Glenfruin (1885), 10 P. D. 103; The Caledonia (1894), 157 U. S. (50 Davis), 174.

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Warranty implied in policy on goods;

689. The warranty of the ship's seaworthiness is equally implied in a voyage policy, whatever be the subject of insurance. It therefore applies no less to insurances effected by the owner of the goods than to those effected by the owner of the ship (*n*). Thus, in an action brought by an innocent shipper of goods (who had no interest whatever in the ship), on proof being given that the ship was unseaworthy when she sailed, Lord Mansfield nonsuited the plaintiff; saying that the implied warranty could not be dispensed with in any case (*o*).

but does not extend to lighters in which they are landed; nor to the goods.

The warranty of seaworthiness which is implied as to the ship does not extend to lighters employed to land the cargo (*p*).

There is no implied warranty in a policy on goods that the goods are seaworthy for the voyage (*q*).

Warranty may be waived by underwriters.

690. It is, however, in the power of the insurers, after a breach of the warranty, to make themselves liable on the risk, by memorandum indorsed on the policy.

Weir *v.* Aberdein.

Under an insurance "on ship and outfit," for a voyage "at and from London to Bahia," the ship sailed from London, and in the Channel encountered bad weather, and made so much water, that it became evident she was overloaded and could not continue her voyage in safety unless she were lightened. The master, with the consent of the underwriters, expressed by a memorandum on the policy (*r*), unshipped part of the cargo in Ramsgate Harbour; and proceeded on his voyage, in the course of which a loss occurred

(*n*) The law is the same in the United States. See The Caledonia, *supra*; and 1 Phillips, s. 695.

(*o*) Oliver *v.* Cowley (1765), 1 Park, Ins. 470. As a rule, in such a case the underwriters on cargo do not rely on the defence of unseaworthiness; they pay the loss and avail themselves by subrogation of the assured's remedies against the shipowner. But this practice does not modify the rule of law stated in the text. See per Stirling, J., in Brooking *v.* Maudslay (1888), 38 Ch. D. 642; per Bigham, J., in Sleigh *v.* Tyser, [1900] 2 Q. B. 336.

(*p*) Lane *v.* Nixon (1866), L. R. 1 C. P. 412.

(*q*) Koebel *v.* Saunders (1864), 17 C. B. N. S. 71.

(*r*) In these terms: "It is agreed that the ship may load, unload and reload goods and discharge part of her cargo at Ramsgate."

Sect. 690. wholly unconnected with the original state of unseaworthiness of the ship when she first sailed from London; the jury found that the ship was seaworthy for her voyage when she sailed from Ramsgate, and the Court, upon this finding and the other facts of the case, held that the underwriters were liable for the loss (*s*).

Lord Tenterden's judgment, as reported, involves the proposition that if a vessel be at the outset unseaworthy, owing to some defect which is discovered and remedied before loss, the policy is not avoided, a proposition which, as we have seen, cannot now be maintained (*t*). The true ground on which the decision must rest is thus stated by Lord Penzance, in delivering the judgment of the Privy Council in Quebec Marine Insurance Co. *v.* Commercial Bank of Canada (*u*): "The case of Weir *v.* Aberdein did not proceed upon the language that is attributed to Lord Tenterden—whether he was fully and rightly reported or not—but the judgment proceeded, as it appears to their Lordships, distinctly upon the principle that the underwriters had been aware of the unseaworthiness, and had assented to the vessel putting back to the port to cure herself of the defect, and therefore they were held responsible. They had assented in writing on the policy to maintain their liability, notwithstanding the violation of the warranty."

No implied warranty that the ship shall continue seaworthy.

691. It is enough to satisfy this warranty that the ship be originally seaworthy for the voyage insured when she sails on it; the assured makes no warranty that the ship shall continue seaworthy in the course of it. "Every ship," says Lord Mansfield, "must be seaworthy when she first sails on

(*s*) Weir *v.* Aberdein (1819), 2 B. & Ald. 320.

(*t*) See Forshaw *v.* Chabert, and Quebec Marine Ins. Co. *v.* Commercial Bank of Canada, *ante*, s. 688. Phillips has cited Lord Tenterden's words, and formulated them into a principle (s. 726); and Chancellor Kent considers his Lordship's argument very weighty. 3 Com. 289. The American cases are, however, indecisive. See Joyce, Ins. vol. iii. s. 2182.

(*u*) L. R. 3 P. C. 234, 244.

the voyage insured, but she need not continue so throughout the voyage" (*x*). Sect. 691.

On this ground it has been frequently held that under a policy on a voyage out and home, the risk being entire and indivisible, it is sufficient to satisfy the warranty if the ship be seaworthy for the entire voyage when she first sails from the home port of loading; and it is not necessary that she should be in a seaworthy condition on sailing from the outport on her homeward passage, or from any intermediate port.

Thus, where the voyage insured was "at and from Honfleur to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur," Lord Mansfield said, that if this was one entire risk (which, as the premium was entire, he held it to be), the underwriters were liable if the ship was seaworthy when she left Honfleur, though she had not been so at Angola, or any of the subsequent stages of the voyage (*y*). Bermon *v.* Woodbridge.

So, where a ship was insured "at and from Belfast to her port or ports of loading in British America, during her stay there, and back to a port of discharge in the United Kingdom," &c., and the evidence showed that she was seaworthy when she sailed from Belfast, but unseaworthy when she left St. Andrew's on the homeward passage, the counsel for the defendants admitted that the implied warranty was satisfied (*z*). Holdsworth *v.* Wise.

The decision of the Privy Council in Biccard *v.* Shepherd (*a*), seems at first sight to conflict with the cases just cited. In that case the policy was on goods "at and from the anchorages off Hondeklip Bay and Port Nolloth to Swansea," from Biccard *v.* Shepherd. Goods shipped at different ports under one policy.

(*x*) Per Lord Mansfield in Bermon *v.* Woodbridge (1781), 2 Dougl. 788, and in Eden *v.* Parkinson (1781), *ibid.* 735; per Lord Eldon in Watson *v.* Clarke (1813), 1 Dow, 344; so *per cur.* in Dixon *v.* Sadler (1839), 5 M. & W. 414, 415.

(*y*) In Bermon *v.* Woodbridge (1781), 2 Dougl. 788.

(*z*) Holdsworth *v.* Wise (1828), 7 B. & Cr. 794. See also *S. P.*, Redman *v.* Wilson (1845), 14 M. & W. 476.

(*a*) (1861), 14 Moo. P. C. 471.

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the loading of the goods on board the ship. She took part of her cargo at Hondeklip Bay, and was seaworthy when she sailed thence; but she was overloaded at Port Nolloth, and thus became unseaworthy. The cargo was lost on the voyage, and the Privy Council held that the assured could recover in respect of the cargo shipped at Hondeklip Bay, but not in respect of that shipped at Port Nolloth. The ground of the decision seems, however, to have been that under the words of the policy two separate risks were insured, one on the parcel of goods shipped at Hondeklip Bay, the other on the parcel shipped at Port Nolloth, and that as to these parcels the voyage began, and therefore the warranty attached, at different times (*b*).

Implied warranty as to crew does not extend to their conduct during voyage.

692. The preceding cases establish the principle that no warranty is implied that the ship, in point of staunchness and repair, shall continue seaworthy throughout the voyage; it is equally certain that the assured makes no warranty for the continued good conduct of the master and crew in the course of the voyage (*c*). If the vessel, crew, and equipment be originally sufficient, and the master a person of competent skill, the assured has done all he contracted to do; and although such master and crew should by their acts or omissions have brought the ship in the course of the voyage, and at the time of loss, into an unseaworthy (*i.e.*, uninsurable) state, yet the underwriter is liable for all loss which, though remotely occasioned by such superinduced state of unseaworthiness, is yet proximately caused by the perils insured against (*d*).

(*b*) (1861), 14 Moo. P. C. 496.

(*c*) Trinder, Anderson & Co. *v.* Thames & Mersey Marine Ins. Co., [1898] 2 Q. B. 114, per Smith, L. J., p. 123.

(*d*) Busk *v.* Royal Exch. Ass. Co. (1818), 2 B. & Ald. 73; Walker *v.* Maitland (1821), 5 B. & Ald. 171; Bishop *v.* Pentland (1827), 7 B. & Cr. 219; Holdsworth *v.* Wise (1828), 7 B. & Cr. 794; and see especially Phillips *v.* Headlam (1831), 2 B. & Ad. 380; Dixon *v.* Sadler (1839), 5 M. & W. 405; *S. C.*, in error (1841), 8 M. & W. 895; Redman *v.* Wilson (1845), 14 M. & W. 476; Phillips *v.* Nairne (1847), 4 C. B. 343; Biccard *v.* Shepherd (1861), 14 Moo. P. C. 471; Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284.

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"It is the duty of the owner," says Bayley, J., "to have the ship properly equipped, and, for that purpose, it is necessary that he should provide a competent master and crew in the first instance; but having done this he has discharged his duty" (*e*). "The assured makes no warranty," says Parke, B., "that the vessel shall continue seaworthy, or that the master and crew shall do their duty during the voyage; and their negligence and misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against. Nor can any distinction be made in this respect between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire, which causes a loss, be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which makes a vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of slipping it or cutting it away; nor could it make any difference, whether any other part of the equipment were lost by mere neglect, or thrown away and destroyed in the exercise of an improper discretion by those on board" (*f*).

Case of unseaworthiness due to negligence during voyage. Redman *v.* Wilson.

693. The numerous cases illustrative of these positions will be considered more at large hereafter, when we come to treat of the losses covered by the policy. We will here, however, cite one which shows that it makes no difference whether the state of unseaworthiness which occasions the loss be caused by the negligence of the master and crew, or of other parties employed by the assured upon the business of the ship in the usual course of trade. A ship insured "from London to Sierra Leone, while there, and back to her port of discharge in the United Kingdom," was loaded with teak at an island on the Sierra Leone river by the African natives (who are generally employed in that trade for the purpose), and having

(*e*) Per Bayley, J., in Walker *v.* Maitland (1821), 5 B. & Ald. 176.

(*f*) Per Parke, B., in Dixon *v.* Sadler (1839), 5 M. & W. 414.

Sect. 693. completed her loading, began dropping down the river on her passage home; it was soon found, however, that, owing in all probability to the unskilful loading of the natives, she had become so leaky as to be unfit to put to sea, and having, on examination, been pronounced unseaworthy, she was voluntarily run on shore to prevent her sinking in the river, and ultimately sold where she lay, as not being fit for repair. The plaintiff claimed a total loss by the perils of the sea; and, the ship having been seaworthy when she sailed from London, the Court held the underwriters liable, as the loss, though remotely arising from the negligence of the natives, was proximately caused by a peril of the sea (*g*).

Effect of admission of seaworthiness in policy.

694. The principle that when the ship starts seaworthy the underwriter is liable for a loss caused remotely by the ship having become unseaworthy, but proximately by a peril insured against, is also illustrated by two cases, where the policy contained a clause by which the ship was "allowed to be seaworthy for the voyage": this clause having been decided to be "a dispensation with the implied warranty of seaworthiness," so as to preclude the underwriter from any defence, on the ground of the ship's not having been seaworthy for the voyage when she sailed, these cases stand on the same footing as though the jury had expressly found the fact of seaworthiness (*h*).

Parfitt *v.* Thompson.

In the earlier case a ship, insured "from Bristol to Sierra Leone, and back," had, by the violence of the winds and waves, become so damaged and leaky that she was obliged to run for Gambia, where she was found to be unseaworthy, and

(*g*) Redman *v.* Wilson (1845), 14 M. & W. 476. See also Dixon *v.* Sadler (1839), 5 M. & W. 405; in error (1841), 8 M. & W. 895; and Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284, in both of which cases this question, apart from that of seaworthiness, was raised, and decided in accordance with the cases mentioned in the text.

(*h*) Parfitt *v.* Thompson (1844), 13 M. & W. 392, 396; Phillips *v.* Nairne (1847), 4 C. B. 343. In the United States it has been held that a certificate of seaworthiness from an inspector of a board of underwriters precluded a member of the board from alleging unseaworthiness. Western Ass. Co. *v.* Southern Cotton Oil Co. (1895), 68 F. 924.

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not within reach of the repairs, which had become indispensable, in consequence of which she was necessarily sold as she lay. The defendants proposed to show that the loss had arisen solely from the decayed and unseaworthy state of the ship, but this they were precluded from doing by their admission of seaworthiness; and the Court held that even supposing the loss to be shown to have been occasioned by the unseaworthy state of the ship at the time of loss, yet that this would be no answer to the action, the loss having been proximately caused by the perils insured against.

Phillips v. Nairne.

In the other case the policy also contained the clause, "the ship to be allowed to be seaworthy for the present voyage." She met with a violent hurricane, by which she was so damaged as to be obliged to run for the Mauritius, where, on survey, it was found that, from the damage caused by the storm and from the age and decayed state of the ship, she was not worth repairing and was accordingly sold. It appeared, however, upon the whole evidence, that but for the storm the decayed parts of the ship would have been strong enough to enable her to perform her voyage with safety. There was a verdict for the plaintiffs, and the Court refused to grant a new trial (*i*).

It follows from these cases that if the ship be admitted to have been seaworthy when she sailed, no subsequent state of unseaworthiness can preclude the assured from recovering for loss immediately caused by the perils insured against, though the state of the ship at the time of loss may be such as to render the damage caused by those perils greater than it might have been had the ship been sound (*k*).

Doctrine of seaworthiness in the United States.

695. The great leading principle, therefore, of the English doctrine of seaworthiness is that there is no implied warranty

(*i*) Phillips *v.* Nairne (1847), 4 C. B. 343; 16 L. J. C. P. 194.

(*k*) It would be different if the loss were shown to be due directly to the unseaworthiness of the ship, without the intervention of any peril insured against. See Fawcus *v.* Sarsfield (1856), 6 E. & B. 192, and Lord Penzance's remarks on that case in Dudgeon *v.* Pembroke (1877), 2 App. Cas. 296.

Sect. 695. thereof, except at the commencement of the voyage (*l*). On this point the law in the United States is at variance with our own, and gives a wider extent to the implied warranty; it is there held that the assured is bound not only to have his vessel seaworthy at the commencement of the voyage, but to keep her so, as far as it depends on himself and his agents, during the continuance thereof, and at the commencement of all its subsequent stages. Thus the underwriters in the United States are held discharged from any loss, which can be distinctly shown to have arisen from the negligence or misconduct of the assured in not keeping the ship in a proper state of repair.

Yet in that country unseaworthiness arising after the commencement of the voyage has, it seems, no retrospective operation in respect of losses accrued prior to the breach of the implied warranty; and it further seems to be the better opinion there, that if the ship sailed seaworthy for the voyage, subsequent unseaworthiness will not operate as a defence, except where the loss is distinctly occasioned by it, and the unseaworthiness itself has arisen from the negligence or misconduct of the assured or his agents: where the loss is totally unconnected with the subsequent state of unseaworthiness, it cannot avail as a defence for the underwriters (*m*).

Is parol evidence admissible to vary the warranty of seaworthiness?

696. An important question, on which there is no decisive authority (*n*), is whether parol evidence can be given to contradict or qualify the warranty of seaworthiness. Arnould's view is expressed in the following passage:—"It is not necessary . . . . that the assured should make any statement

(*l*) The assured cannot, however, recover for a loss brought about by his own wilful act or default. Thompson *v.* Hopper (1856), 6 E. & B. 172; Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284; Trinder, Anderson & Co. *v.* Thames & Mersey Marine Ins. Co., [1898] 2 Q. B. 114, C. A.

(*m*) See 1 Phillips, Ins. ss. 728—736; 3 Kent, Com. 288, 289; 1 Parsons, Ins. 380; 3 Joyce, Ins. s. 2174. According to Parsons, breach may sometimes only suspend liability until seaworthiness be restored, even though the unseaworthiness exists when the risk commences. See also 1 Phillips, Ins. s. 726.

(*n*) See per Williams, J., in Clapham *v.* Langton (1864), 34 L. J. Q. B. 46.

with regard to any of the constituents of seaworthiness. Should he, however, in answer to inquiries from the underwriter or otherwise, make a positive representation as to any of these facts, his position, as regards the underwriter, is not thereby altered in the slightest degree; *e.g.*, if he represented that the ship was copper-sheathed, or properly found in sails, he would not, because he had made the representation, be any the less bound by the implied warranty that she was also seaworthy in all other respects. If, indeed, he represents some fact inconsistent with a state of seaworthiness, and the underwriter, notwithstanding this statement, yet chooses to take the risk—as, if he represented that the ship was not properly coppered or not adequately found in sails—this would operate so as to release him to this extent from the obligation of the implied warranty" (*o*). This view, that an implied warranty may be qualified by evidence of a representation, has also the support of Phillips (*p*), Duer (*q*), and of Cockburn, C. J., in Burges *v.* Wickham (*r*), all of whom consider that an implied term in a contract rests on a presumed intention of the parties to be bound by it, and that the presumption may be rebutted by evidence of a contrary intention. On the other hand, Blackburn, J., in the same case, expressed a strong view that parol evidence cannot be admitted to qualify an implied warranty. The warranty of seaworthiness, said the learned judge, is as much a part of the policy as if there were written in it, "warranted seaworthy" (*s*). The Court of Queen's Bench held, in a somewhat earlier case, that a term of a written contract implied by usage cannot be varied by evidence of a parol agreement (*t*). The cases are analogous, and therefore the balance of judicial authority in this country is in favour of the view

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(*o*) 2nd ed. vol. i. p. 577, in the chapter on "Misrepresentation."

(*p*) 1 Phillips, s. 602.

(*q*) 2 Duer, 669—672.

(*r*) (1863), 3 B. & S. 684; 33 L. J. Q. B. 23. Wightman, J., concurred in this judgment.

(*s*) 3 B. & S. 696; 33 L. J. Q. B. 28. Mr. Maclachlan strongly supports this view (Arnould, 6th ed. p. 541, n.).

(*t*) Fawkes *v.* Lamb (1862), 31 L. J. Q. B. 98. See *ante*, s. 57.

Sect. 696. that the warranty of seaworthiness can only be dispensed with or qualified by a written term of the contract.

Evidence may be given of communications relevant to the construction of the warranty.

This does not, however, apply to extrinsic evidence, the purpose of which is to show what the subject-matter of the contract is, and consequently what degree of seaworthiness is required. There is no fixed standard of seaworthiness; the degree of seaworthiness required depends on the nature of the adventure (*u*). Therefore, for the purpose of construing the warranty, evidence can be given that the underwriter was informed that a ship insured for a certain voyage was from her construction not capable of being made as fit to encounter the perils of that voyage as any ordinary vessel; and in such a case the utmost that the warranty requires is that the particular ship shall be made as fit for the voyage as is practicable (*w*).

No implied warranty of seaworthiness in a time policy.

697. Hitherto we have only considered the nature and extent of the implied warranty of seaworthiness in relation to voyage policies: it was for some time assumed, though not decided, that there was no distinction in this respect between voyage policies and time policies (*x*).

A series of cases, however, beginning with the decision of the House of Lords in the well-known case of Gibson *v.* Small, and ending with the decision of the same tribunal in Dudgeon *v.* Pembroke, has conclusively established the rule, that in a time policy on ship a warranty that the vessel is seaworthy will under no circumstances be implied (*y*). Thus the rule holds good, even though at the commencement of the risk the ship be lying at a home port. "The case of Gibson *v.* Small," said Lord Penzance, in Dudgeon *v.* Pem-

(*u*) See *post*, s. 710.

(*w*) Burges *v.* Wickham (1863), 3 B. & S. 669; 33 L. J. Q. B. 17; Clapham *v.* Langton, in the Exch. Ch. (1864), 34 L. J. Q. B. 46. See *post*, s. 710.

(*x*) See, *e.g.*, per Tindal, C. J., delivering the judgment of the Exchequer Chamber in Dixon *v.* Sadler (1841), 8 M. & W. 895, 900.

(*y*) Gibson *v.* Small (1853), 4 H. L. C. 353; Thompson *v.* Hopper (1856), 6 E. & B. 188; Fawcus *v.* Sarsfield (1856), *ibid.* 192; Michael *v.* Tredwin (1856), 17 C. B. 551; Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284.

broke, "supplemented as it was by the two cases of Thompson v. Hopper and Fawcus v. Sarsfield, must be considered to have set at rest the controversies on this subject, and to have finally decided that the law does not, in the absence of special stipulations in the contract, infer in the case of a time policy any warranty that the vessel at any particular time shall have been seaworthy." If, however, through the personal misconduct of the owner, the ship be sent to sea in an unseaworthy state, he cannot recover for a loss brought about by such wilful act or default (z). Sect. 697.

698. We have already seen that the underwriter is liable for no loss after the ship sails, unless at that time she was seaworthy for the voyage; although, however, seaworthiness for the voyage at the time of sailing is a condition precedent to the underwriter's liability for loss in the course of the voyage, yet it is not necessarily a condition precedent to the policy's attaching. There are degrees of seaworthiness.

There are, in fact, degrees of seaworthiness: seaworthiness for the voyage is one thing; and seaworthiness in port, or for an inland navigation, &c., quite another (a).

Thus it is quite certain that a ship under a policy "at and from" would be seaworthy in harbour while undergoing repairs, though it is equally clear that she would not be seaworthy for the voyage if she sailed in that condition (b). Seaworthiness in port under policy "at and from."

(z) Thompson v. Hopper, *supra;* Dudgeon v. Pembroke, *supra;* Trinder, Anderson & Co. v. Thames & Mersey Marine Ins. Co. (C. A.), [1898] 2 Q. B. 114.

(a) Forbes v. Wilson (1800), 1 Park, Ins. 472; 1 Marshall, Ins. 147; Hibbert v. Martin (1808), 1 Park, Ins. 473; Smith v. Surridge (1801), 4 Esp. 25; Parmeter v. Cousins (1809), 2 Camp. 235; Annen v. Woodman (1810), 3 Taunt. 299; and see Parke, B., in Dixon v. Sadler (1839), 5 M. & W. 405, 414—afterwards cited by himself in the judgment of the P. C. in Biccard v. Shepherd (1861), 14 Moo. P. C. 471, 491, and by Willes, J., in Bouillon v. Lupton (1863), 33 L. J. C. P. 37, 42; Quebec Marine Ins. Co. v. Commercial Bank of Canada (1870), L. R. 3 P. C. 234.

(b) Forbes v. Wilson (1800), 1 Park, 472; Smith v. Surridge (1801), 4 Esp. 25, before Lord Kenyon. Lord Ellenborough ruled the same point in Hibbert v. Martin (1808), 1 Park, Ins. 473, and in Parmeter v. Cousins (1809), 2 Camp. 235.

Sect. 698. What that degree of seaworthiness is which is requisite to make a policy "at and from" attach upon a ship while in port, has nowhere been very accurately laid down. Generally speaking, it may be said that under such a policy a ship will be sufficiently seaworthy to give an inception to the risk if she "be in such a condition while in port as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage." On the other hand, if she arrives so shattered as to be a mere wreck, the policy never attaches (*c*). Thus, if a ship be capable while "at" the port of being moved from one part of the harbour to another for the purpose of repair, and of being moored alongside its wharves or quays there in order to take in her cargo, the policy attaches. Consequently the assured is not entitled to a return of premium, as on a risk that never commenced, because the ship afterwards sailed from the port in a state of unseaworthiness for the voyage (*d*). "The condition that she shall be seaworthy for her voyage," says Lawrence, J., "does not attach till she sails" (*e*).

Ship seaworthy for port, unseaworthy on sailing.

Of course, if she ultimately sails unseaworthy for the voyage, this, according to the rule already laid down, wholly discharges the underwriter from all liability for loss on the voyage, although the policy may have attached on her while "at" the port, owing to her having been there seaworthy for her then risk (*f*).

Doctrine of voyages in stages.

699. The rule, thus established in the case of policies "at and from" a place, is in reality a particular instance of a more general principle suggested by Patteson, J., in Hollingworth *v.* Brodrick (*g*), and for the first time distinctly enunciated in 1839, by Parke, B., in the case of Dixon *v.*

(*c*) Parmeter *v.* Cousins (1809), 2 Camp. 235; Buchanan *v.* Faber (1899), 4 Com. Cas. 223. The law is the same in the United States. See cases cited 1 Phillips, Ins. ss. 695 *et seq.*; 3 Kent, Com. 289.

(*d*) Annen *v.* Woodman (1810), 3 Taunt. 299.

(*e*) *Ibid.* 300.

(*f*) Parker *v.* Potts (1814), 3 Dow, 27, per Park, *arguendo*; Watson *v.* Clark (1813), 1 Dow, 336.

(*g*) (1837), 7 A. & E. 47.

Sadler (*h*). The principle is, that if the voyage insured consists of different stages requiring different states of seaworthiness, the warranty is satisfied if the ship be at the commencement of each stage in a fit condition for that stage, though not fit for a subsequent one. Thus, as was laid down in Dixon *v.* Sadler, "if the voyage be such as to require a different complement of men or a different state of equipment in different parts of it, as if it were a voyage down a *canal or river*, and thence across the open sea, it would be enough if the vessel were in each stage of the navigation properly manned and equipped for it" (*i*). "The case of Dixon *v.* Sadler, and the other cases which have been cited," said Lord Penzance (*k*), "leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well-recognized and distinctly separate stage of the voyage." The principle now being considered is itself a modification, in favour of the assured, of the rule that the warranty of seaworthiness is not satisfied, and the policy does not attach, until the ship is seaworthy for the whole voyage insured. Sect. 699.

700. It follows that if the ship were lost in one stage of the voyage, it would be no defence that she was not then seaworthy for a stage which she had not commenced; nor, if lost in the course of her main voyage, could the underwriters discharge themselves from liability by showing that, though seaworthy when she commenced such main voyage, she had yet sailed on its earlier stages with an inferior equipment (*l*). Effect of doctrine of stages.

(*h*) (1839), 5 M. & W. 405, 414.

(*i*) Dixon *v.* Sadler, *ubi supra*; accord. Erle, J., in Thompson *v.* Hopper (1856), 6 E. & B. 172; Biccard *v.* Shepherd (1861), 14 Moore P. C. 471, 491; Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234, 241.

(*k*) Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 241.

(*l*) If by "inferior equipment" Arnould meant an equipment insufficient for the earlier stages, the editors submit that it is more in accordance with principle, to say that in a policy for one entire voyage a breach of the warranty of seaworthiness avoids the insurance altogether from the time of the breach,

Sect. 700. Thus, where a ship insured "at and from New Orleans to Liverpool" was so much injured by worms while she lay in the mud of the river Mississippi that she would have been in an unfit state for her sea voyage, Lord Ellenborough held, that as she was then sufficiently seaworthy for the purposes of lying in the mud and being in the river, and the defect had been discovered and repaired before she sailed on her sea voyage, her prior state of unfitness for the sea did not avoid the policy (*m*).

So, to take a case put by Lord Tenterden, suppose a ship would be unseaworthy unless she had two anchors, being destined for a long voyage, and she sails from London to Gravesend with only one, shall it be said that if no loss happens between London and Gravesend, and the vessel at Gravesend takes on board her second anchor, and then proceeds on her voyage, that the underwriters are not liable for her subsequent loss? His Lordship, as might be supposed, answers this question in the negative (*n*).

River and sea voyage.

701. The rule that there are different degrees of seaworthiness for different stages of the voyage is well illustrated as regards a river and sea voyage by the following case:—

Bouillon *v.* Lupton.

A steamer insured "at and from Lyons to Galatz" sailed from Lyons with a river crew and captain, and without her masts, anchors and other heavy articles, which it was impossible for her to carry on the river voyage. At Arles she took on board her sea-captain and some of her seagoing crew, and was otherwise fitted for the voyage to Marseilles, where she had to call for a license. At Marseilles she was

even though the voyage be divided into stages.

(*m*) Oliverson *v.* Loughman (1815), cited in 2 B. & Ald. 322. The law is the same in the United States. See Treadwell *v.* Union Ins. Co. (1826), 6 Cowen's R. 270; and Bell *v.* Reed (1811), 4 Binn. R. 127; 1 Phillips, Ins. s. 720.

(*n*) Per Lord Tenterden, 2 B. & Ald. 324. It might, however, be a deviation to call at a place lower down a river than the *terminus a quo* to complete the equipment, unless necessity required or usage allowed this to be done. See Forshaw *v.* Chabert (1821), 3 Brod. & B. 158.

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fully equipped for the sea voyage, as was usual in similar adventures, and she was subsequently lost in the Black Sea. The Court held that, looking to the nature of the adventure and to mercantile usage, the ship had complied with the implied warranty of seaworthiness (*o*).

Fishing voyage.

The division of a voyage into stages in relation to the warranty of seaworthiness may take place even in different parts of a sea voyage, as for instance in the Greenland whale fishery, where it has been customary to take on board extra hands on arriving at Shetland. There can be no doubt that the ship in sailing from Hull to Shetland would, by reason of the usage, be seaworthy with a different equipment from that which would be required to make her so, on sailing from Shetland to the North Seas (*p*).

Stage of voyage for which a pilot is required.

702. If usage requires that at a particular stage of the voyage the ship should take a pilot on board, either before leaving or entering a port, it may be said that the part of the voyage on which it is usual to have a pilot is a separate stage, requiring a crew differing from the usual one in that it ought to include a pilot. It has not been laid down in terms that such part of the voyage is to be treated as a separate stage for the purpose of the warranty of seaworthiness, although there is a suggestion to that effect in Patteson, J.'s, judgment in Hollingworth *v.* Brodrick (*q*). It was, however, stated in the second edition of this work (*r*) that "generally speaking, no ship is seaworthy at the outset of the risk, unless she have on board a pilot where requisite by law or usage for her safe navigation" (*r*). It was further stated that "in all cases where it is necessary, either by law or usage, for the master to have a pilot on board in going out of an intermediate port, or in clearing from his outport homewards, it will be unsea-

(*o*) Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37.

(*p*) See per Collins, L. J., in The Vortigern, [1899] P. 159; per Lord Penzance in Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 241.

(*q*) (1837), 7 A. & E. 48.

(*r*) 2nd ed. p. 723. See also per Parke, J., in Phillips *v.* Headlam (1831), 2 A. & E. 383.

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worthiness not to take one, for it is in such cases always in his power to do so" (*s*).

Effect of not having pilot on entering a port.

The question, however, of the effect of a failure to take a pilot on board before entering an intermediate port or that of the ship's destination, is one of much doubt and difficulty. When usage requires that a pilot should be taken at such point of the voyage, it has been inferred that the ship's failure to do so, in consequence of which a loss accrues, will discharge the underwriters from their liability, although the loss may be proximately caused by the perils insured against and the ship have been in all respects seaworthy at the commencement of the voyage.

Result of the authorities.

The position established by the English cases seemed, however, in Arnould's opinion (*t*), to be that except where required by the positive regulations of an Act of Parliament (which according to Patteson, J., have the effect of creating an intermediate voyage on which the ship is not seaworthy without a pilot) (*u*), the negligence of the master in not taking a pilot on board in entering a port at any intermediate stage of the voyage, where usage requires him to do so, will not discharge the underwriters from their liability, provided the ship were seaworthy when she sailed, the master and crew originally competent, and the loss, though remotely occasioned by the want of a pilot, be proximately caused by the perils insured against (*v*).

Phillips *v.* Headlam.

Thus the captain of a ship insured "from Liverpool to Sierra Leone, and back to her ports of discharge in the United Kingdom," on arriving off Sierra Leone (where there is an establishment of pilots, and where it is usual for all ships

(*s*) 2nd ed. p. 724, citing Lord Tenterden in 2 B. & Ad. 382; see also 2nd ed. p. 703. Parke, B., however, in Gibson *v.* Small, in the House of Lords (1853), 4 H. L. C. 398, states in general terms that there is no warranty "that pilots shall be taken on board at proper places if the voyage has already commenced, unless, perhaps, when required by Act of Parliament."

(*t*) 2nd ed. vol. i. p. 700. See also *post*, s. 724.

(*u*) In Hollingworth *v.* Brodrick (1837), 7 A. & E. 44.

(*v*) Phillips *v.* Headlam (1831), 2 B. & Ad. 380; Law *v.* Hollingworth (1797), 7 T. R. 160, as commented upon by Patteson, J., 7 A. & E. 48, and by Tindal, C. J., 8 M. & W. 900.

Sect. 702.

going in or out of the river to take one), made signals for a pilot to come off; but as none did so, after waiting some hours, he took his ship in without one, in doing which she struck the ground and was lost by the perils of the seas. The jury found that the master had acted with a wise discretion and as a prudent man ought under the circumstances: the Court, while agreeing with this verdict, intimated that even had the facts been otherwise and the loss had been remotely occasioned by the negligence or mistake of the master, yet, assuming him to have been originally a person of competent skill, the underwriters would have been liable, for the loss was proximately caused by the perils insured against (*x*).

Where pilotage compulsory on entering port. Law *v.* Hollingworth.

703. In the case of Law *v.* Hollingworth the captain of a ship insured "from Stettin to London," took a pilot on board at Orfordness, but improperly allowed him to leave the ship at Halfway Reach, after which, and before she came to her moorings, the ship was lost. The Court held that the underwriters were not liable for this loss, on the ground that at the time of loss the ship was unseaworthy for want of a pilot, owing to the negligence of the captain (*y*).

This case, on the broad ground assumed by the Court, is inconsistent with the current of later authorities, and especially with what fell from the judges in the case of Phillips *v.* Headlam. The Courts, however, instead of overruling it, preferred putting it upon a narrower ground than that assumed as the basis of decision by the judges who tried it, but quite consistent with the facts of the case, viz., that the ship at the time of loss had not a pilot on board, as required by Act of Parliament (the then Pilot Act of 5 Geo. 2, c. 20).

Judicial comments on this case.

Thus Patteson, J., says: "In Law *v.* Hollingworth there was an intermediate voyage, if I may so say, constituted by Act of Parliament, upon which voyage the ship was not seaworthy unless she had a pilot" (*z*). And Tindal, C. J., says: "The

(*x*) Phillips *v.* Headlam (1831), 2 B. & Ad. 380.

(*y*) Law *v.* Hollingworth (1797), 7 T. R. 160.

(*z*) In Hollingworth *v.* Brodrick (1837), 7 A. & E. 44.

Sect. 703. decision may be maintainable on the ground of an implied warranty to observe the positive regulations of an Act of Parliament; but if it is to be taken as an authority that the implied warranty on the part of the assured extends to acts of negligence on the part of the master and crew throughout the voyage, we think it cannot be supported against the weight of the later authorities" (*a*).

Conclusion. **704.** It is indeed clear that Law *v.* Hollingworth cannot be supported on the ground that the loss by a peril insured against was due to unseaworthiness caused by the captain's negligence, for it is now established that the underwriter is liable for every loss by a peril insured against, unless it has been brought about by the wilful act or default of the assured himself (*aa*). It may also be doubted whether the decision can be supported on the ground that the ship was not being navigated in accordance with the requirements of an Act of Parliament. The general rule established by later cases is that an illegality in the mode of performing a voyage does not avoid the insurance, unless the assured was a party to the illegality or aware of it when the insurance was made (*b*). Further, even if the warranty of seaworthiness does require that a pilot should be taken on board at the commencement of the stage when the ship is about to enter a port, the decision cannot be supported on the ground of this warranty; for the warranty of seaworthiness does not imply a further warranty that the pilot or any of the crew will continue to do their duty. It seems, therefore, that Law *v.* Hollingworth cannot be based on any sound principle.

There is no case which decides that the warranty of seaworthiness requires a pilot to be taken on board in entering a port where it is usual or prudent to have one. Phillips *v.* Headlam (*c*) is to some extent a decision to the contrary;

(*a*) Per Tindal, C. J., in delivering the judgment of the Exchequer Chamber in Sadler *v.* Dixon (1841), 8 M. & W. 900.

(*aa*) See Trinder *v.* Thames, &c. Ins. Co., [1898] 2 Q. B. 114.

(*b*) See Wilson *v.* Rankin (1865), L. R. 1 Q. B. 162, and the other cases cited *post*, s. 745.

(*c*) (1831), 2 A. & E. 380.

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though the case seems to have turned chiefly on the exploded theory that the underwriter is not liable for a loss by a peril insured against, brought about by the captain's negligence (*d*).

Arnould, though he adopted the view that the ship is not seaworthy in leaving an intermediate port without a pilot where it is proper to employ one, did not consider it a breach of the warranty for the ship to enter a port without a pilot (*e*), and Phillips takes the same view (*f*). There are certainly strong reasons why this view should prevail. It may not always be possible to get a pilot, and the state of the weather or condition of the ship may make it more prudent for the master to try to enter without one than to wait outside, or even render it imperative for him to make the attempt.

Stages for coaling.

705. In the cases already considered, where the voyage has been divided into stages in relation to the warranty of seaworthiness, the different stages have required different equipments or crews. Recently the principle has been applied in a new class of cases, where the nature of the risk does not change in passing from one stage to another.

It is commercially impossible for cargo steamers on long voyages to take on board at the beginning a sufficient supply of fuel to last the whole voyage. Two decisions of the Court of Appeal, both in actions on charter-parties, have established the rule that when a steamship starts on a long voyage with only enough coal for part of the voyage, the intention being to take on board a fresh supply at one or more intermediate ports, the voyage is considered as divided into stages for the purpose of coaling, and the warranty of seaworthiness attaches at each coaling port for the stage which ends at the next coaling port (*g*). The decision in the later case was expressly declared to be applicable to contracts of insurance. "In my judgment," said Smith, L. J., "when a question of

(*d*) Phillips cites it (vol. i. s. 716) to prove that the warranty has no application in this case.

(*e*) See 2nd ed. pp. 702, 703.

(*f*) 1 Phillips, ss. 715, 716.

(*g*) Thin *v.* Richards, [1892] 2 Q. B. 141; The Vortigern, [1899] P. 140.

Sect. 705. seaworthiness arises either between a steamship owner and his underwriter upon a voyage policy, or between a steamship owner and a cargo owner upon a contract of affreightment, and the underwriter or cargo owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that at the commencement of each stage the ship had on board a sufficiency of coal for that stage—in other words was seaworthy for that stage."

Cases on this point. Thin *v.* Richards.

706. In Thin *v.* Richards (*h*), the voyage was from Oran to Garston, with liberty to call at Huelva. The ship left Oran with a supply of coal insufficient for the voyage to Garston, but sufficient to take her to Huelva, and through a mistake of the engineer, who over-estimated the quantity still on board at Huelva, sailed thence without taking a fresh supply. Day, J., held that the voyage was an entire voyage from Oran to Garston, and that the warranty of seaworthiness was broken when the ship sailed from Oran. The Court of Appeal did not decide whether the voyage was entire or was divisible into two stages—*i.e.*, from Oran to Huelva and the other from Huelva to Garston—but held that in either view of the case the warranty was broken. If the voyage was entire, they said, the ship should on starting have had enough coal to take her to Garston; if it was a voyage in stages, the ship ought to have been properly equipped at Huelva for the later stage.

The Vortigern.

In The Vortigern (*j*) the facts were that a steamer left Cebu in the Philippine Islands for Liverpool. She coaled at Labuan, and again at Colombo, intending to coal again at Suez (*k*). A reasonably sufficient quantity of coal was not,

(*h*) [1892] 2 Q. B. 141.

(*j*) [1899] P. 140.

(*k*) The original intention was to coal again at Port Saïd, but the case was treated by both parties on the

however, taken on board at Colombo for the stage ending at Suez, and when passing Perim, a coaling station in the Red Sea, the master did not call there owing to the negligence of the engineer, in not telling him in answer to his inquiries that the coal was running short. The consequence was that some of the cargo had to be used as fuel to enable the ship to reach Suez. The Court of Appeal held, affirming the decision of Barnes, J., that the voyage was as regards the supply of coal to be treated as one in stages, that the ship was not seaworthy for the stage from Colombo to Suez, and that the charterer could recover from the shipowner the value of the cargo burned in consequence of the breach of the warranty of seaworthiness. Sect. 706.

The language of Barnes, J., in this case suggests that it is for the master to determine how the voyage is to be divided into stages (*l*); but it is clear from the decision of the Court of Appeal that whether or not the voyage can be divided into stages must depend on its length, not on the will of the assured; and according to Smith, L. J., "in each case it is a matter for proof as to where the necessity of the case requires that each stage should be" (*m*).

707. The judgment of the Court of Appeal assumes that they were relaxing in favour of the shipowner the rule that, to be seaworthy, a steamship must start with enough coal for the whole voyage, whatever its length may be. It may, however, be questioned whether the decision in The Vortigern has not, on the contrary, imposed an additional burden on the assured, imposing on him a liability for his servants' negligence or errors of judgment, which was not contemplated by the parties to the contract of insurance. The decision is a new application of the principle of dividing a voyage into stages. This principle was introduced for the benefit of the assured, in cases where a different equipment or crew was required in different parts of the voyage. It Remarks on The Vortigern.

footing of an intention to coal at Suez.

(*l*) [1899] P. 147.
(*m*) *Ibid.* p. 155.

Sect. 707. has never previously been applied against the assured, in the case of a ship unable to carry a sufficient supply of consumable stores for the whole voyage, starting with a reasonable supply of such stores, and taking insufficient supplies on board at an intermediate port.

The warranty of seaworthiness, as Collins, L. J., says, in The Vortigern itself (*n*), has always been relative. Though absolute when it attaches, its precise extent and limitations are relative, and vary according to the standard which the parties must have been supposed to contemplate as applicable to the adventure. What, then, is the warranty contemplated by the parties, when from the nature of the voyage it is obvious that a steamship cannot start with enough coal for the whole voyage? There is some significance in the fact that no similar question to that raised in The Vortigern has arisen in respect of the provisioning of the old sailing ships engaged in long voyages, although it is improbable that the question could never have been raised. Is it unfair to suppose that as regards consumable stores, of which a sufficient stock for the whole voyage could not be taken, the parties have contemplated a warranty which would be satisfied, once for all, by taking on board a reasonable supply, regard being had to the nature of the voyage, to usage and to the facilities for obtaining further supplies afterwards? It is, therefore, suggested that the Court might, consistently with the principles of the law of insurance, have decided that the warranty of seaworthiness is entirely satisfied, when the ship sails with a reasonable quantity of those stores of which she cannot carry a supply for the whole voyage (*o*).

(*n*) [1899] P. 158. See also the judgment of Cockburn, C. J., in Burges *v.* Wickham (1863), 33 L. J. Q. B. 17.

(*o*) Such a warranty would, of course, leave the shipowner liable to the charterer for a loss caused by the negligence of his servants, in not taking enough coal on board at a port of call, unless, as in The Vortigern, the charterer had agreed to take upon himself the risk of their negligence.

In the Marine Insurance Bill, 1899, s. 40, the doctrine of stages is only applied to stages "during which the subject-matter insured will be exposed to different degrees or kinds of peril, or the ship will require different kinds of equipment." It

Sect. 708.

Ship at sea when risk commences. Hucks v. Thornton.

708. It was held in one case, that where the risk first attaches on the ship, after she has been some time at sea, the implied warranty will be satisfied if she be then in such a state of repair and equipment that she may be safely navigated home, or is competent to pursue any part of her adventure. The policy, which was for time, first attached after the ship had been engaged for a year in the South Sea whale and sea fishery, and also in taking prizes; and it was laid down by Gibbs, C. J., that though at the time the policy attached the crew were so far reduced by death and desertion as to be inadequate for the twofold purpose of whaling and guarding the prisoners they had taken, yet, as they were fully competent for the seal fishery and other purposes of the voyage, and likewise to navigate the vessel home, the implied warranty of seaworthiness was satisfied (*p*).

This ruling was delivered before it was established that there is no warranty of seaworthiness in time policies, and is therefore of no authority whatever (*q*); and it is submitted, on the authority of the reasoning in Gibson *v.* Small (*r*), that there is no warranty in any insurance which commences when the ship is at sea, that the ship is seaworthy at the commencement of the risk. It may, however, well be, when a ship is insured for a part of a voyage described in the policy (*e.g.* "from A. to B. for thirty days," or "from the 1st of January at and from A. to B."), that the warranty of seaworthiness implied in all voyage policies exists, and that the ship must therefore be seaworthy on sailing, though the risk only attaches subsequently (*s*). The question is, however, still an open one.

seems, therefore, that under such a provision the Court would have to hold, in cases on marine policies, either that the ship must always sail with enough coal for the whole voyage, or that the warranty is a modified one, such as is suggested in the text.

(*p*) Hucks *v.* Thornton (1815), Holt, N. P. Cas. 30.

(*q*) See Parke, B.'s, remarks on this case in Gibson *v.* Small (1853), 4 H. L. C. 403.

(*r*) (1853), 4 H. L. C. 353.

(*s*) There is a guarded passage in Pollock, C. B.'s, opinion in Gibson *v.* Small (*ibid.* 410) which supports this view, and an equally guarded ex-

Sect. 709.

Is the warranty modified when the voyage begins at a distant port?

709. The ruling of Gibbs, C. J., in Hucks *v.* Thornton, has led some of the American authorities to lay down a further rule, viz., that when the risk attaches, after a long voyage, at a distant port, where proper facilities for repairs may not exist, the warranty must be construed with reference to the means of repair and equipment at hand (*t*). It is submitted, however, that the absence of means at the *terminus a quo* for making the ship seaworthy cannot be taken into consideration. It is no doubt true that the rule that there is a warranty of seaworthiness in all voyage policies rests on the presumption that the shipowner has the power to make his vessel seaworthy; and that the contrary rule in time policies was established because the ship may be at sea when the risk attaches, and it may therefore be impossible for the owner to provide for her seaworthiness. But these rules, once established, are of general application. "It may happen in some cases," says Parke, B., "from the want of proper materials, of skilful artisans, of proper docks in the port of outfit, of sufficient funds or credit, or from the hidden nature of defects, that the owner may not be able to fulfil the duty of making the ship seaworthy at the commencement of the voyage; but the law cannot regard these exceptional cases, '*ad ea quae frequentius accidunt jura adaptantur;*' and it wisely, therefore, lays down a general rule, which is a most reasonable one in the vast majority of cases, that the assured impliedly contracts to do that which he ought to do on and before the commencement of the voyage" (*u*). The question for a jury is whether the ship was fit at the beginning of the risk to encounter the perils of the voyage insured; and that question, it is submitted, must be answered without reference to the circumstances of an antecedent voyage, or to the

pression of opinion to the contrary by Parke, B. (*ibid.* 407).

(*t*) See per Shaw, C. J., in Paddock *v.* Franklin Ins. Co. (1831), 11 Pick. 227, 231; 1 Phillips, s. 727; 1 Parsons, 387.

(*u*) Per Parke, B., in Gibson *v.* Small (1853), 4 H. L. C. 404, cited with approval by Blackburn, J., in Burges *v.* Wickham (1863), 3 B. & S. 692; 33 L. J. Q. B. 26; see also per Talfourd, J., in Gibson *v.* Small (1853), 4 H. L. C. 376.

means of having repairs effected or of obtaining fresh hands. Sect. 709.

710. It is obvious that there can be no fixed and positive standard of seaworthiness, but that it must vary with the varying exigencies of mercantile enterprise. "The ship," said Lord Cairns, "should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter" on the voyage (*v*). That state of repair and equipment which would constitute seaworthiness for one description of voyage might be wholly inadequate for another; a ship seaworthy for the coasting or West Indian trade might be unseaworthy for a voyage to the Greenland Seas or the North-West Passage. Moreover, the extent of the warranty may be different for the same voyage at different seasons, or for the same voyage at the same season according to whether the ship is in ballast or loaded with one kind of cargo or another (*x*). And, as we have seen, the ship, though not fit to go to sea, may be fit for port or river risks, and it suffices that her state is commensurate to the risk (*y*).

What constitutes seaworthiness. The standard varies with the voyage.

Again, the class of vessel may be such as will not admit of being put into that condition of seaworthiness requisite in ordinary cases for the contemplated voyage. The effect of this is not to dispense with the implied warranty of seaworthiness, but to accommodate the warranty to what is reasonably practicable in the particular case. But the underwriter must be informed of the peculiar nature of the

The standard varies in respect of the class of ship.

(*v*) Steel *v.* State Line S.S. Co. (1877), 3 App. Cas. 72, 77. It has been held in the United States that "it is not the best and most skilful form of construction that is required to meet the warranty of seaworthiness, but only a sufficient construction for vessels of the kind insured and the service in which they are engaged:" per Hammond, D. J., in Moores *v.* Louisville Underwriters (1882), 14 F. 226.

(*x*) *Per cur.* Daniels *v.* Harris (1874), L. R. 10 C. P. 1, 6. See also Stanton *v.* Richardson (1874), L. R. 9 C. P. 390 (Exch. Ch.).

(*y*) Annen *v.* Woodman (1810), 3 Taunt. 299; Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37; *per cur.* Dixon *v.* Sadler (1839), 5 M. & W. 405, 414; per Alderson, B., in Gibson *v.* Small (1853), 4 H. L. C. 393.

Sect. 710. risk, otherwise the policy can be avoided on the ground of concealment. Thus, if a steamer built for river navigation is to be sailed from this country to Calcutta or to Odessa, and the underwriter accept the risk with full information as to the class of vessel and the intended voyage, the assured is only required to make her as seaworthy for the voyage as is reasonably practicable with such a vessel by ordinary available means (*z*.) But he is bound to that much (*a*); and even such a description of the subject of insurance in the "slip," as that it is an "abandoned ship," does not dispense with this warranty and the assured's obligation under it (*b*). Whether in fact the vessel was in such a condition as satisfies this warranty in the particular case is a question for the jury (*c*).

It has differed in different periods.

711. Again, the standard of seaworthiness has been gradually raised in the course of the nineteenth century, from a more perfect knowledge of ship-building, a more enlarged experience of maritime risks, and an increased skill in navigation (*d*).

Query, whether it varies according to the country to which the ship belongs.

So, again, a degree of equipment and preparation is deemed essential in some countries, which would be considered superfluous in others; in such cases it has been held in the United States that seaworthiness is to be measured by the standard in the ports of the country to which the vessel belongs, rather

(*z*) Burges *v.* Wickham (1863), 33 L. J. Q. B. 17; 3 B. & S. 669; cited with approval by Collins, L. J., in The Vortigern, [1899] P. 159; Clapham *v.* Langton (1864), 34 L. J. Q. B. (in error) 46. It is advisable in these insurances to insert in the policy a description of the class of vessel, *e. g.*, "river steamer," and thereby remove any question of evidence modifying the stringency of the warranty. See per Blackburn, J., in Burges *v.* Wickham, *supra*.

(*a*) Turnbull *v.* Janson (1877) (C. A.), 36 L. T. 635, in which it was held that for want of reasonable strengthening of a river steamer for crossing the Atlantic, the policy had never attached.

(*b*) Knill *v.* Hooper (1857), 2 H. & N. 277; 26 L. J. Ex. 377. Similarly, it has been held in the United States that the warranty applies to a timber raft, though insured by a "cargo policy." Moores *v.* Louisville Underwriters (1882), 14 F. 226.

(*c*) Knill *v.* Hooper, *supra*; Burges *v.* Wickham, *supra*.

(*d*) 3 Kent, Com. 288. And cf. Burges *v.* Wickham (1863), 33 L. J. Q. B. at p. 27, per Blackburn, J.

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than by that in the ports of the country where the insurance was made (*e*). "It seems to me," says Story, J., "that where a policy is underwritten on a foreign vessel, belonging to a foreign country, the underwriter must be taken to have a knowledge of the common usages of trade in such country as to equipments of vessels of that class, for the voyage in which she is destined" (*f*). This rule appears full of good sense and equity, and worthy of adoption in our own jurisprudence.

Extent of the warranty depends on the subject of insurance.

712. The warranty must be construed with reference to the subject-matter of the insurance. Therefore the Court of Common Pleas held that it is not satisfied in a policy on a deck cargo, if in ordinary rough weather the goods must be jettisoned, although this could be done without difficulty, and the ship could then perform the voyage with safety to herself. The effect of the warranty, it was said, cannot be to contemplate the destruction, in an ordinary voyage, of the subject of insurance (*g*). On the other hand, the Court said that if the policy had been on the ship, and the deck cargo, by reason of the facility with which it could have been got rid of, would have caused no danger to the ship, the warranty would have been satisfied (*h*). So, also, where cattle were insured against mortality, and the appliances for ventilation and the number of cattle-men attending to the cattle were both insufficient, Bigham, J., held that warranty of seaworthiness had not been fulfilled (*i*).

Thus it appears that on the same voyage the warranty may be complied with as regards a policy on the ship, and not satisfied as regards a policy on goods. As regards the ship, the warranty requires that she shall be fit to encounter the perils of the voyage; as regards goods, the warranty also implies that the ship shall be fit, with reference to the perils

(*e*) Kent, *ubi supra*, n. (*a*).

(*f*) Per Story, J., in Tidmarsh *v.* Washington Ins. Co. (1827), 4 Mason, R. 439; 1 Parsons, Ins. 134, 386.

(*g*) Daniels *v.* Harris (1874), L. R. 10 C. P. 1, 9.

(*h*) *Per cur. ibid.* p. 8.

(*i*) Sleigh *v.* Tyser, [1900] 2 Q. B. 333.

Sect. 712. insured against, for the carriage of the particular cargo, *i.e.*, fit in respect of those things which appertain to its safe carriage to its destination (*k*).

Bearing these observations in mind, we will proceed to examine what has been held to constitute unseaworthiness for the voyage; considering, first, those cases in which the unseaworthiness has arisen from something defective in the state of the ship; secondly, those in which it has arisen from deficiency or incompetency in the master and crew.

What is seaworthiness as regards the hull, stores and rigging of the ship.

713. The implied warranty of seaworthiness, as far as relates to the condition of the ship, requires that when the ship sails on her voyage she should be well furnished, tight, sound, staunch and strong; competent, that is, in her hull to resist the ordinary attacks of wind and weather on the voyage insured, and properly rigged, stored and provisioned for such voyage.

Ship found unseaworthy soon after sailing.

714. If in a short period after sailing on the voyage she become leaky and founder, or be obliged to put back or run for port in distress, without encountering any extraordinary peril, or other visible cause to produce such effect, there arises a presumption of fact that she was not seaworthy when she sailed (*l*). If, after her return to port, it be found on survey that the leakiness arose from loosening of the timbers of her hull, owing to the decayed state of her bolts and fastenings, this is, generally speaking, a clear case of unseaworthiness.

The case of the "Mills" frigate

In the case of the "Mills" frigate, indeed, the Court of Exchequer allowed the assured to recover under a policy "at

(*k*) See *ibid.* p. 336.

(*l*) Munro *v.* Vandam (1794), 1 Park, Ins. 469; per Lord Eldon, Watson *v.* Clark (1813), 1 Dow, 344; Pickup *v.* Thames Ins. Co. (C. A.) (1877), 3 Q. B. D. 594. See such a case mentioned by Willes, J., where, however, the jury found against the presumption, Wilson *v.* Jones (1867), L. R. 2 Ex. at p. 143; see also 1 Phillips, s. 725, and Moores *v.* Louisville Underwriters (1883), 14 F. 226. In an action on a charter-party the United States Supreme Court held that a defect in a vessel developed without any apparent cause is to be presumed to have existed when the service began. Work *v.* Leathers (1878), 97 U. S. (7 Otto), 379.

and from the Leeward Islands to London," where the ship without encountering any bad weather became so leaky the day after she put to sea, owing to the generally decayed condition of her bolts, that she was obliged to run for a port of distress, where she was condemned as irreparable; and the Court of Error confirmed the judgment (*m*). Park states that the judgment of the Court below proceeded upon the point, that though the ship was not seaworthy for the voyage when she sailed, yet she had been seaworthy at the commencement of the risk in port while loading, which was sufficient under a policy at and from to satisfy the implied warranty. It is unnecessary to say that a judgment proceeding on such a basis could not now be sustained (*n*). Sect. 714. cannot be supported.

Under a policy on freight "at and from Honduras to London" (*o*), the ship lay at Honduras about five months, taking in a cargo of mahogany and logwood, during which period she appeared to be in a seaworthy state. The day after sailing from Honduras, however, she encountered a gale of wind and was making 10½ inches water per hour; the leakiness increased day by day for a week afterwards, and then she was making 3½ feet water per hour; and, another gale coming on, she strained so much that the captain bore away in distress for Montego Bay, Jamaica. There a survey was had, and the report was that her iron fastenings were decayed, three of her beams broken, the main beam in two places; that she was making 18 inches water per hour from the loose state of the ship throughout; and that she had evidently spread, having no support for her lower deck from knees, either fore or aft or otherwise. Upon this evidence, irrespective of the want of knees, Lord Eldon was clearly of opinion that, as Parker *v.* Potts.

(*m*) Mills *v.* Roebuck (temp. Lord Mansfield), 1 Marshall, Ins. 154; 1 Park, Ins. 460.

(*n*) Parker *v.* Potts (1815), 3 Dow, 27; Watson *v.* Clark (1813), 1 Dow, 336.

(*o*) The insurance in terms was on freight, "beginning the adventure at Honduras, until the said ship, with her goods and merchandize, should be arrived at London." It was assumed throughout the argument, and not disputed by Lord Eldon in his judgment, that this amounted to an insurance "at and from."

Sect. 714. nothing had occurred after she had left Honduras Bay to account for her being in such a state, the ship was unseaworthy when she sailed from Honduras, and consequently that the underwriters were not liable (*p*).

Want of knees. Watt *v.* Morris.

715. In an earlier case the House of Lords had decided that a ship was not seaworthy for a voyage to the Baltic for want of knees. The vessel, originally of 80 tons burden, had been lengthened so as to be of 110 tons, but the mainhold beams in the centre, where she had been cut asunder and lengthened, were not supported or strengthened by knees; no new anchor, sails, or rigging were provided, and the old anchor, sails, and rigging were insufficient for the altered ship. She had, besides, no stove in the cabin, though essential for winter risks in the Baltic, which the present was. Upon this state of facts, but principally on the ground of the want of knees, Lord Eldon held that the ship was not seaworthy when she sailed (*q*).

Decayed ironwork and timbers. Douglas *v.* Scougall.

716. A ship insured for a voyage "from Leith to Pictou" was repaired at Leith to the amount of about 280*l.*, which the repairers certified to cover every repair necessary for her voyage. This was in April. On the 23rd of May she sailed, and on the 6th and 7th of June she encountered a severe gale of wind, in which she sprang her bowsprit, and began to make so much water that the crew could not keep her free with both pumps, and the master in distress bore up for Greenock. There it was found that the ironwork in general was very much decayed and wrought loose; the timbers and planks, generally speaking, sound, but decayed about the bolts and nails, which in several places were quite gone. Several of the lower deck beams and knees were decayed and sprung, and one plank below the lower deck beams on each side was decayed; the bowsprit was also sprung and the stem wrought loose on account of the decayed iron and labouring

(*p*) Parker *v.* Potts (1815), 3 Dow, 23.
(*q*) Watt *v.* Morris (1813), 1 Dow, 32.

of the ship at sea. Upon these facts, Lord Eldon was clear that the vessel was not seaworthy when she sailed (*r*). Sect. 716.

717. If a ship is so heavily or so improperly loaded, when she sails on the voyage insured, as to be incapable of encountering the voyage, that is unseaworthiness (*s*). Overloading and want of trim.

A ship may also be unseaworthy because she cannot with safety to herself carry the kind of cargo with which she is loaded. The warranty, said the Court in Daniels *v.* Harris (*t*), is "different according to whether the same ship . . . . was loaded with one kind of cargo or another." Thus, in an action on a charter-party, where the ship was laden with a cargo of wet sugar, the drainage from which was such that ordinary pumps, such as she was fitted with, could not deal with it and the ordinary leakage from the ship, though they were sufficient for ordinary purposes, and the ship could not safely go to sea with the cargo on board, she was found to be unseaworthy for the voyage (*u*). There can be no doubt that, under the circumstances described, the warranty of seaworthiness in a policy would not have been satisfied. Ship not fitted to carry the particular cargo safely.

718. Besides being competent in hull to resist the ordinary attacks of wind and weather on the voyage insured, the ship must be properly equipped with sails, ground tackling, stores, provisions, and all other things which the custom of trade has made requisite for the voyage. Rigging, stores and provisions.

A ship insured in time of war "at and from Jamaica to London" was held unseaworthy because at the time of sailing, although her stern sails were in good condition, yet her maintop-gallant and studding-sails were extremely rotten and unserviceable, and she was therefore not as secure as Rotten sails. Wedderburn *v.* Bell.

(*r*) Douglas *v.* Scougall (1816), 4 Dow, 269.

(*s*) Weir *v.* Aberdein (1819), 2 B. & Ald. 320; Redman *v.* Wilson (1845), 14 M. & W. 476; Biccard *v.* Shepherd (1861), 14 Moo. P. C. 471; Foley *v.* Tabor (1861), 2 F. & F. 663. So, also, in the United States improper stowage has been held to be unseaworthiness. The Frey (1899), 92 F. 667.

(*t*) (1874), L. R. 10 C. P. 1, 6.

(*u*) Stanton *v.* Richardson (1872), L. R. 7 C. P. 421; in the Exch. Ch. (1874), L. R. 9 C. P. 390.

Sect. 718. possible from capture. And the assured on this ground was held precluded from recovering, though the ship went down in a hurricane in which such sails would have been useless (*x*).

Defective boiler.

A vessel insured "at and from Montreal to Halifax in Nova Scotia" sailed with a defective boiler; but the defect did not appear until she had passed into salt water, and then it became necessary to put back and repair the boiler. After sailing again she was lost by perils of the sea. It was held that she was not seaworthy, at all events at the stage when she passed into salt water, and consequently that the underwriters were not liable (*y*).

Deficient ground tackling.

A vessel is unseaworthy if not provided with ground tackling sufficient to encounter the ordinary perils of the sea, as where a ship sailed with the cable of the small bower anchor so worn and decayed as to be unfit for service, and with a best bower anchor too light and short in the shank for a vessel of her tonnage (*z*).

Sufficient stores. Proper medicines.

719. Sufficient stores and supplies for the voyage are requisite to seaworthiness (*a*). Lord Eldon at Nisi Prius declared it to be his opinion that the assured was as much bound to show that he had provided proper medicines and necessaries for the voyage, as he was to establish the tightness of the ship (*b*).

Fuel and candles.

In the United States a vessel not properly supplied with fuel and candles has been held not to be seaworthy (*c*).

Bunker coals for steamship.

A steamship must, in order to be seaworthy, have a supply of fuel sufficient for the ordinary vicissitudes of the voyage (*d*). It is, however, commercially speaking, impossible on many voyages to start with enough coal for the whole voyage; and

(*x*) Wedderburn *v.* Bell (1807), 1 Camp. 1.

(*y*) Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234.

(*z*) Wilkie *v.* Geddes (1815), 3 Dow, 57.

(*a*) Per Lord Ellenborough, Wedderburn *v.* Bell (1807), 1 Camp. 2; Stewart *v.* Wilson (1843), 12 M. & W. 11.

(*b*) Woolff *v.* Claggett (1800), 3 Esp. 257, 259.

(*c*) Fontaine *v.* Phœn. Ins. Co. (1813), 10 Johnson's R. 58.

(*d*) Per Lord Esher, Thin *v.* Richards (C. A.), [1892] 2 Q. B. 141, 143.

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the Court of Appeal has held that, when a ship must necessarily take in coal at ports of call, the voyage is to be treated as divided into stages for the purpose of coaling, and that the warranty attaches at the beginning of each stage, for which, therefore, a sufficient quantity of coal must be taken on board (*e*).

Adjustment of compasses.

720. In one case in the United States, where a vessel ran on a rock in consequence of the needle of the compass being drawn out of its direction two or three points by an iron fastening near which the compass was placed, it was contended that this was unseaworthiness; but the Court, on evidence being given that there was no negligence in this case in the construction of the ship, were of opinion that it was not so (*f*).

There can hardly be a doubt that the proper adjustment of the ship's compass, especially in iron vessels, is an essential element of seaworthiness.

Neglect of some precaution.

The fact that some precaution has been neglected at the time of sailing does not make the ship unseaworthy, if she be in such a state and so equipped that, if the master and crew do their duty, no extra danger will be incurred. Thus, if a port-hole be left open, through which, in the event of bad weather, the water would enter, the ship is not unseaworthy if in such event the port-hole could at once be closed. If, however, the port-hole be so circumstanced (as where the cargo has been piled up against it) that it could not, if bad weather came on, be readily closed at sea, the ship may on that account be unseaworthy (*g*). So also it has been held

Open port-hole.

(*e*) Thin *v.* Richards, *supra*; The Vortigern, [1899] P. 140. See, as to these cases, *ante*, ss. 705—707.

(*f*) Stanwood *v.* Rich, State Court of Massachusetts, Nov. 1817, cited 1 Phillips, Ins. s. 701.

(*g*) Steel *v.* State Line S.S. Co. (1877), 3 App. Cas. 72, 82, 90; Hedley *v.* Pinkney & Sons S.S. Co. (C.A.), [1892] 1 Q. B. 58. See also Gilroy *v.* Price, [1893] A. C. 56. The law is the same in the United States. See The Silvia (1898), 171 U. S. (64 Davis), 462. There is a suggestion in Hedley *v.* Pinkney & Sons S.S. Co. that a defect which touches the safety of individuals on board, but does not affect the safety of the ship, does not constitute unseaworthiness within the meaning of

Sect. 720. in the United States that the obstruction of a water-pipe by a piece of wood, being accidental and temporary in character, was not unseaworthiness (*h*).

Ship must have a competent master and crew.

721. We come now to consider that kind of unseaworthiness which consists in the deficiency or incompetence of the crew.

Every ship at the time of sailing must be properly manned, with a master of competent nautical skill, a crew sufficient to navigate her on the voyage insured, and a pilot on board whenever there is an establishment of pilots at the port and the nature of the navigation requires one (*i*).

1. Of the master.

First, of the master.—He must be a person sufficiently well acquainted with the usual course of navigation on the voyage insured, to be able to conduct the vessel in safety through its ordinary perils; and if he is grossly ignorant of that, the ship is not seaworthy.

Tait *v.* Levi.

Thus a ship was insured "from Cork to the ship's loading port or ports on the coast of Spain, within the Straits of Gibraltar, including Tarragona, and not higher up the Mediterranean," and the captain, through entire ignorance of the coast, mistook Barcelona for Tarragona, and was captured in endeavouring to enter the former port, which is higher up the Mediterranean than Tarragona, and was then in possession of the forces of Napoleon. The Court considered this a breach of the implied warranty to provide a master of reasonably competent skill (*k*).

the Merchant Shipping Act, 1894, ss. 457, 458.

(*h*) The Mexican Prince (1897), 82 F. 484.

(*i*) Per Parke, J., in Phillips *v.* Headlam (1831), 2 A. & E. 383. Arnould's text was, "A pilot on board whenever required by law" (2nd ed. p. 720); on p. 723 he said, "Where requisite by law or usage for her safe navigation." The rule as stated by Parke, J., seems the better one, as in relation to the warranty of seaworthiness the real question is, what is requisite for the safe navigation of the ship. The law may, for the encouragement of pilots, make their employment compulsory where a competent master could himself safely conduct his ship. There may, however, be a presumption of fact that a pilot is necessary, wherever pilotage is compulsory.

(*k*) Tait *v.* Levi (1811), 14 East, 481. It is submitted that the warranty can be stated more broadly, viz., as one to provide a competent master. Thus, a master of com-

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722. The question as to the competency of the captain and crew must always depend upon the nature of the voyage, on which they are employed under the policy.

The question of the competency of captain and crew depends on the voyage.

The insurance being on a voyage "from Mauritius to London," the captain on sailing from Mauritius was very ill, and next day feeling himself, from increased illness, incompetent to take charge of the ship, he inquired of his two mates whether they could manage the voyage to England, but finding no one competent to undertake it, he put back: Lord Tenterden, on this evidence, asked the jury "whether they thought, considering the length of the voyage from Mauritius to England, that a ship could be sufficiently manned when, in the event of any accident to the captain, there was no one else on board able to perform his duties." The jury, which was special, found for the underwriters (*l*).

The mates.

Chancellor Kent questions the soundness of this doctrine in any case, and observes that the warranty of seaworthiness "would seem to imply no more, than that the assured must have a sound and well-equipped vessel with reference to the voyage, and have on board a competent person as master, a competent person as mate, and a competent crew as seamen"; he also cites American cases in which Lord Tenterden's doctrine has been discarded, as far as regards the American coasting and West Indian trade (*m*).

The doctrine thus impugned would undoubtedly operate with a good deal of harshness if enforced with regard to short voyages, or vessels of small burden. It ought probably to be confined to similar voyages of great length. With this limitation it is accepted by Phillips (*n*).

Want of certificate.

A question which we have already mentioned, and shall only refer to here, is whether shipping an uncertificated

petent skill might be incompetent by reason of habitual intemperance. There is a decision in the United States that the incompetence of a pilot is not established by proof of a single instance of intoxication, where previous good character and competence are proved. Rogers *v.* Ætna Ins. Co. (1896), 76 F. 569.

(*l*) Clifford *v.* Hunter (1827), 1 Moo. & M. 103; *S. C.*, reported in 3 C. & P. 16.

(*m*) 3 Kent, Com. 287, n. (*c*).

(*n*) 1 Phillips, Ins. s. 708.

Sect. 722. master or mate or engineer, contrary to statute, would amount to unseaworthiness (*o*). Viewed in the light of decisions on kindred questions, it would seem to be an illegality which, in the case of privity on the part of the assured, would avoid the policy. Whether it is necessarily conclusive when the question is one of unseaworthiness is more doubtful. When an officer, though unqualified, has performed his duties properly and no loss has taken place which can be imputed to him, a jury would probably be justified in refusing to find that his mere lack of qualification had the effect of rendering the vessel unseaworthy (*p*).

2. As to the crew.

723. Secondly, as to the crew.—"The owner," says Lord Tenterden, "as a condition precedent is bound to provide a crew of competent skill" (*q*). "The crew," says Lord Ellenborough, "must be adequate to discharge the usual duties, and to meet the usual dangers to which she is exposed" (*r*).

If the crew be sufficient when the ship sailed on the voyage insured, the implied warranty is fully satisfied, unless it be a voyage of successive stages differing in degree or kind of risk, and consequently in the description of crew required (*s*). The assured does not contract that the ship shall continue to be properly manned throughout the voyage, nor is he responsible for any subsequent negligence or misconduct on the part of the crew (*t*).

It is, however, indispensably necessary that the ship should be properly manned for the voyage at the time she sails on it (*u*); if not, the underwriters are not liable. Thus, a policy

(*o*) See 1 Phillips, Ins. s. 713.

(*p*) See Hathaway *v.* St. Paul Fire & Mar. Ins. Co. (1880), 1 F. 197; *post*, s. 724.

(*q*) Shore *v.* Bentall (1828), 7 B. & Cr. 798, n.

(*r*) In Hunter *v.* Potts (1815), 4 Camp. 203.

(*s*) Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37.

(*t*) Busk *v.* Royal Exch. Co. (1818), 2 B. & Ald. 73; Walker *v.* Maitland (1821), 5 B. & Ald. 175; 7 B. & Cr. 219; Shore *v.* Bentall (1828), *ibid.* 798, n.; Dixon *v.* Sadler (1839), 5 M. & W. 405; *S. C.*, in error (1841), 8 M. & W. 895.

(*u*) Arnould said (2nd ed. vol. i. p. 722), on the authority of Hucks *v.* Thornton (1815), Holt, N. P. 30, that "if at the time the policy attaches, the ship has been some time engaged on a distant voyage, although the numbers of the crew

was effected on a voyage "at and from Cuba to Liverpool," without any leave given to touch and stay in the original policy. The captain having lost some of his outward crew by sickness and desertion at Cuba, and finding it impossible there to engage ten men, his proper complement, for Liverpool, sailed from Cuba with only eight men engaged for Liverpool, and two for Montego Bay (Jamaica), where he touched and landed the two men, and whence, having procured others to supply their place, he proceeded on his voyage to Liverpool. The Court held that the ship was not seaworthy when she sailed from Cuba for a voyage to Liverpool, as she ought then to have had on board a full complement of men engaged for the whole voyage (*x*). Sect. 723.

724. Thirdly, as to the pilot.—This question has already been considered, and we will here only state the result of the authorities. Generally speaking, no ship is seaworthy at the outset of the risk unless she have on board a pilot, where requisite for her safe navigation. 3. As to the pilot.

The law also seems to be, that it is not a breach of the warranty of seaworthiness for a ship to enter a port where it is usual to employ a pilot, without having one on board. Consequently, when a ship is lost by a peril insured against, in entering such a port without a pilot, the assured can recover, although the loss might not have occurred if a pilot had been on board, and was remotely caused by the negligence or misconduct of the master in entering without a pilot (*y*). *A fortiori* Result of the cases.

may have been greatly reduced by death or desertion, yet the implied warranty will be satisfied if they are at that time sufficient for navigating the ship home, or for performing any of the purposes of the voyage insured." See, however, as to this case, *ante*, s. 708.

(*x*) Forshaw *v.* Chabert (1821), 3 Brod. & B. 158. The judgment of the Court in this case mainly proceeded on the ground that there had been a material alteration in the policy, and also a deviation, but all the Judges except one held that the ship was unseaworthy. See also Ridsdale *v.* Newnham (1814), 4 Camp. 111. The decision in Forshaw *v.* Chabert is criticised by Phillips (vol. i. s. 710).

(*y*) Phillips *v.* Headlam (1831), 2 B. & Ad. 380; see also Trinder, Anderson & Co. *v.* Thames & Mersey Mar. Ins. Co., [1898] 2 Q. B. 114; and *ante*, ss. 702—704,

Sect. 724. the underwriter will be so liable if the master on arriving off the port have done his best to procure a pilot to come off, and has only entered the harbour without one when it became the wisest course for him, as a prudent and skilful man, so to do (z).

If not only usage, but the positive regulations of an Act of Parliament, require a pilot to be taken on board on entering either an intermediate or a home port, then it has in one case of doubtful authority been held to be unseaworthiness to enter such port without one (a).

And in all cases where it is necessary, either by law or usage, for the master to have a pilot on board in going out of an intermediate port, or in clearing from his outport homewards, it is in the opinion of some learned judges unseaworthiness not to take one, for it is in such cases always in his power to do so (b). The question may arise whether, if the warranty of seaworthiness requires a pilot to be on board, it is satisfied when an unqualified pilot is employed. In the United States it has been held that the mere fact that a ship has an unlicensed pilot on board is not *primâ facie* proof of unseaworthiness (c). It is submitted that to satisfy the warranty it is enough that the pilot should be competent (d). If he navigate the ship properly, this is evidence of his skill. A pilot appointed by authority is presumed to be competent (e).

Of the proof of unseaworthiness.

725. The burden of proof on the issue of unseaworthiness is on the underwriter (f). Where, however, a ship soon after sailing founders, or becomes so leaky or disabled as to be unable to proceed, and this cannot be ascribed to any

(z) Phillips *v.* Headlam, *supra.*

(a) Law *v.* Hollingworth (1797), 7 T. R. 160. See *ante*, ss. 703, 704.

(b) Per Lord Tenterden in 2 B. & Ad. 382. See *ante*, s. 702.

(c) Hathaway *v.* St. Paul Fire & Mar. Ins. Co. (1880), 1 F. 197.

(d) 1 Phillips, ss. 712, 713.

(e) 1 Phillips, s. 712.

(f) Parker *v.* Potts (1815), 3 Dow, 23; Davidson *v.* Burnand (1868), L. R. 4 C. P. 117; Pickup *v.* Thames Ins. Co. (1878), 3 Q. B. D. 594.

violent storm or other adequate cause, the fair presumption is that it arose from causes existing at the time of her sailing, and consequently that she was not then seaworthy. That, however, is but an inference from the facts, and not a presumption of law (*g*). Yet if such inference of fact be well founded, it has the effect of shifting the burden of proof to the assured (*h*). Sect. 725.

If, on the other hand, the loss takes place long after sailing, or under such circumstances that it may fairly be attributed, *primâ facie*, to the violent and immediate action of the winds and waves, or other perils insured against, then, if the underwriters mean to rely on the defence that the ship was unseaworthy when she sailed, the *onus probandi* will be on them (*i*).

Even when a ship has been at sea some time, "if during the whole of the time she has had favourable weather, fair winds and calm seas, and yet goes down or proves unable to continue on her course, the same inference as to unseaworthiness presents itself as in" the case of a ship proving unseaworthy shortly after sailing, "though perhaps with diminished cogency in proportion as the interval has been longer" (*j*).

Even though shortly after sailing the ship may have encountered boisterous weather, bad and dangerous seas, stiff breezes, or even severe gales, yet, if she be then in a state of decay or damage which cannot fairly be accounted for by the perils to which she has been exposed, the inference may still be that she was unseaworthy when she sailed (*k*).

(*g*) Pickup *v.* Thames Ins. Co. (1878), 3 Q. B. D. 594; followed in the United States in Moores *v.* Louisville Underwriters (1883), 14 F. 226. See Ajum Goolam Hossen *v.* Union Mar. Ins. Co. (1901), 17 Times L. R. 376 (P. C.)

(*h*) Per Cockburn, C. J., and on appeal per Brett and Thesiger, L. JJ., in Pickup *v.* Thames Ins. Co., *supra*; and see Munro *v.* Vandam (1794), 1 Park, Ins. 469; per Lord Eldon, Watson *v.* Clark (1813), 1 Dow, 336, 344; Parker *v.* Potts (1815), 3 Dow, 23; Anderson *v.* Morice (1874—75), L. R. 10 C. P. 58, 609.

(*i*) Per Blackburn and Lush, JJ., in Wilson *v.* Jones (1867), L. R. 2 Ex. 139, 143; and per Thesiger, L. J., in Pickup *v.* Thames Ins. Co. (1878), 3 Q. B. D. 594, 604.

(*j*) *Per cur.* Pickup *v.* Thames Ins. Co. (1878), 3 Q. B. D. 594, 598.

(*k*) Watson *v.* Clark (1813), 1 Dow, 336; Parker *v.* Potts (1815), 3 Dow,

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Effect of clause admitting ship to be seaworthy.

Of course, if there be a clause in the policy, admitting the seaworthy state of the ship on sailing, the underwriters are thereby precluded from any defence on the ground of unseaworthiness, in the absence of fraud on the part of the assured in obtaining this admission (*l*).

Evidence of unseaworthiness.

726. With regard to the means of proving that the ship was seaworthy, or the reverse, the most satisfactory evidence is that of the persons who were employed to survey and examine the vessel; after their evidence has been given, however, experienced shipwrights, who never saw the ship, may be called to say whether, upon the facts sworn to, she was in their opinion seaworthy or not (*m*).

Where a ship has been ordered to be sold abroad, as unseaworthy, by the sentence of a Vice-Admiralty Court, such sentence is no evidence of the facts or grounds on which the condemnation proceeded (*n*).

The question of seaworthiness is for the jury.

The whole question as to what constitutes seaworthiness, is peculiarly a question for a jury; and hence, where a special jury of merchants had twice given their verdict one way on a question of seaworthiness, the Court, although they considered the verdict not altogether satisfactory, refused to grant a rule for a third trial (*o*); nor would they allow the consolidation rule to be opened, in order to try the same question in another action against another underwriter on the same policy (*p*).

Implied condition

727. If a ship be not provided with those documents which

23; Douglas *v.* Scougall (1816), 4 Dow, 269; and see Foster *v.* Steele (1837), 3 Bing. N. C. 892.

(*l*) Parfitt *v.* Thompson (1844), 13 M. & W. 392; Phillips *v.* Nairne (1847), 4 C. B. 343; 16 L. J. C. P. 194.

(*m*) Per Lord Kenyon, Thornton *v.* Royal Exch. Co. (1790), 1 Peake, 25; per Lord Ellenborough, Beckwith *v.* Sydebotham (1807), 1 Camp. 116.

(*n*) Wright *v.* Barnard (1798), 2 Esp. 700; 1 Marshall, Ins. 152; 2 Park, Ins. 863. See also Ballantyne *v.* Mackinnon (C. A.), [1896] 2 Q. B. 455; The Eliza Cornish (1853), 1 Ecc. & Ad. R. 36; and Maclachlan, Merch. Shipping, 4th ed. pp. 170, 171.

(*o*) Foster *v.* Steele (1837), 3 Bing. N. C. 892.

(*p*) Foster *v.* Alvez (1837), *ibid.* 896.

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that the ship shall be properly documented.

are required by the general law of nations, or by international treaties, to prove her national character, she is exposed, especially in seasons of general maritime war, to the danger of being condemned for the want of them.

Proofs of national character.

It is therefore an implied condition in every policy effected by the shipowner, that the ship in the course of the voyage and at the time of seizure shall have on board all such documents, whether her national character be or be not the subject of warranty or representation in the policy: it is not, however, requisite that she should sail with such documents, unless she be represented or warranted as of a particular national character (*q*).

Difference between this implied condition and the implied warranty of seaworthiness.

728. The consequences, however, of a failure to comply with this implied condition are very different from those that follow upon a breach of the implied warranty of seaworthiness.

The warranty of seaworthiness, in the words of Lawrence, J., "is implied from the very nature of a contract of insurance; the consideration of an insurance is paid in order that the owner of a ship which is capable of performing her voyage may be indemnified against certain contingencies, and it supposes the possibility of the underwriters gaining the premium; but if the ship be incapable of performing the voyage, there is no possibility of the underwriters gaining the premium, and if the consideration fails the obligation fails. But that is not the case with a ship not having proper documents on board: she may nevertheless perform the voyage; at least, there is no certainty that she will not, as there is in the case above alluded to" (*r*).

(*q*) Unless the ship be warranted or represented as of a particular nation, she need not sail with documents of neutrality. Per Lord Ellenborough in Bell *v.* Carstairs (1811), 14 East, 374, 393 (see as to this case per Willes, J., in Thompson *v.* Hopper (1858), E. B. & E. 1048); *aliter*, if there be a warranty, Rich *v.* Parker (1798), 7 T. R. 705. By the 68th section of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), the national character of every ship is to be declared before clearance. It is arguable that the authorities said to establish the implied condition only show that the assured cannot recover for a loss due to his own default; see per Collins, L.J., in Trinder *v.* Thames, &c. Ins. Co., [1898] 2 Q. B. 128.

(*r*) Per Lawrence, J., in Christie *v.* Secretan (1799), 8 T. R. 192; see also the observations of the Court in

Sect. 728. Accordingly, it is established that a want of proper documents on board discharges the underwriter from his liability only when the sentence of the foreign Prize Court shows that the condemnation proceeded either expressly upon that as the sole ground, or as one of the grounds (*s*); and it has further been held by Lord Ellenborough, and not contradicted by any subsequent authority, that even in this case the underwriter will not be discharged unless his contract was with the owner of the ship, from whom he had a right to expect, and who had the power to provide, that she should have on board all documents required for her protection (*t*).

The foreign sentence must obviously proceed on this ground.

729. First, in order to discharge the underwriter on the ground of a failure to provide proper documents of nationality, it must distinctly appear, from the whole of the foreign sentence taken together, that the want of such documents was the ground, or a ground, of condemnation.

At one time, as we have already seen, our Courts, in interpreting the sentences of foreign tribunals of prize, would only look to the adjudicative part of the sentence for the ground on which the foreign Court proceeded (*u*).

A more reasonable canon of construction was adopted afterwards; and the rule now is that, if upon examination of the whole sentence taken together it appears that want of proper documents, as required by treaties, was one of the alleged grounds on which the sentence of condemnation proceeded, our Courts will consider the sentence proof that the assured has failed to comply with the implied condition, and hold the underwriter discharged from his liability (*x*).

Price *v.* Bell (1801), 1 East, 663. So, in the United States, Chancellor Kent (then Ch. J.) intimated that it was no part of the implied warranty of seaworthiness that the ship should be properly documented, on the ground "that the vessel, without such documents, might be quite competent to perform the voyage." In Elting *v.* Scott (1807), 2 Johnson's R. 157, cited 1 Phillips, Ins. s. 746.

(*s*) See the remarks of Lawrence, J., in Price *v.* Bell (1801), 1 East, 673.

(*t*) Dawson *v.* Atty (1806), 7 East, 367.

(*u*) Christie *v.* Secretan (1799), 8 T. R. 192. See *ante*, s. 680.

(*x*) Bell *v.* Carstairs (1811), 14 East, 374; Bell *v.* Bromfield (1812),

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Consequently, where an American ship (not warranted American) was condemned in a French Court of Prize on the express ground, alleged in the premises of the sentence, that she was not properly documented according to the existing convention between the French Republic and the United States, Lord Ellenborough held that the underwriters on ship were discharged from their liability, although the sentence also proceeded on the ground of a suppression of papers by the master after her capture (*y*). Bell *v.* Carstairs.

So where an American ship, which had sailed from New York to London with naval stores, was chartered from London for a voyage to the Baltic during the height of Napoleon's Continental system, and ultimately condemned in a Danish Prize Court for want, amongst other grounds of condemnation, of a sea passport and muster rolls, the Court held the underwriters discharged from their liability, although if the ship had produced her sea passport it would have subjected her to French condemnation under the Berlin decree, as showing that she had last come from London (*z*). Steel *v.* Lacy.

730. Secondly, the implied condition that the ship shall be properly documented does not extend to any document except those required by the general law of nations or by subsisting international treaties; for the purpose of this defence, therefore, it must clearly be made out that the documents, for want of which the ship was condemned, fell within one or other of these two categories (*a*). 2. The lacking document must be required by law or treaty.

Hence, where an American ship was condemned on the express ground that she had not the documents required by certain recent French Ordinances, which were contrary to the Price *v.* Bell.

15 East, 364; Steel *v.* Lacy (1810), 3 Taunt. 285. In Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 463, it was said that the cases in which a want of neutrality is conclusively proved by the sentence of a foreign Court are exceptional, the general rule being that a decision *in rem* is not conclusive as to the grounds thereof.

(*y*) Bell *v.* Carstairs (1811), 14 East, 374.

(*z*) Steel *v.* Lacy (1810), 3 Taunt. 285. The ship had been represented American.

(*a*) Per Bayley, J., in Bell *v.* Bromfield (1812), 15 East, 368.

Sect. 730. terms of the treaty then subsisting between France and the United States, and not adopted by any public international act of the two governments, it was held that the underwriters were not discharged from their liability (*b*).

Bell *v.* Bromfield. Again, where an American ship was condemned in a Danish Prize Court because her sea passport was not verified with the notary's name and seal of office, the Court called upon the counsel for the underwriters to show by what rule of the law of nations, or by what clause in any subsisting treaties between Denmark and the United States, it was required that the sea passport of an American ship should be so verified (*c*).

Le Cheminant *v.* Allnutt. A register is not a document required by the law of nations as evidence of a ship's national character; hence, where a ship described in the charter-party as a Pappenburgher, was condemned in a Danish Prize Court "for want of a Pappenburgh register," the Court held that the underwriter, in order to discharge himself from liability, must show that a register was required as a proof of national character by some subsisting treaty between Denmark and the country to which the ship belonged (*d*). "We want evidence," says Mansfield, C. J., in giving judgment against the underwriters, "to show on what reasons the want of this register was made a ground of condemnation."

3. Want of proper documents is only a defence against the shipowner. **731.** Thirdly, it has been laid down by Lord Ellenborough, after full consideration, that a want of proper documents shall only discharge the underwriter when the insurance is effected for the shipowner, and not for the owner of the goods.

Carruthers *v.* Gray. Thus where, from an omission of the captain, goods insured for a voyage from this country to a foreign port were not mentioned in the ship's manifest as required by Act of Parliament, but it did not appear that the loss was in any degree

(*b*) Price *v.* Bell (1801), 1 East, 663.

(*c*) Bell *v.* Bromfield (1812), 15 East, 364, 368.

(*d*) Le Cheminant *v.* Allnutt (1812), 4 Taunt. 367.

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owing to this defect, Lord Ellenborough held the underwriters liable on the ground that there was no implied warranty, on the part of the owner of the goods, that the ship should be properly documented (*e*).

Dawson *v.* Atty.

Thus, where the policy was "on goods" on board a ship which was in fact, but not represented to be, an American, and the ship being captured by the Spaniards was condemned on the express ground of her not being properly documented according to the treaties then subsisting between Spain and the United States, Lord Ellenborough held that the underwriters were not discharged on this account (*f*); and on this case being mentioned in that of Bell *v.* Carstairs, his Lordship supported it on the ground that it was the case of an insurance on goods, "where the owner of the goods has no concern in the obtaining of the proper documents with which the vessel is to be furnished for the voyage": whereas in a policy on ship "the shipowner is bound to have such documents as are required by treaties with particular nations to evince his neutrality in respect to such nations" (*g*).

Confirmed in Bell *v.* Carstairs.

Remarks on this limitation to the general doctrine.

Marshall (*h*) and Phillips (*i*) seem to consider this distinction a very questionable one, upon the ground that the assured on goods might as well contend that the unseaworthiness of the ship was no answer to his claim upon the underwriter. But as, according to authorities already cited,

(*e*) Carruthers *v.* Gray (1811), 3 Camp. 142; *S. C.* (1812), 15 East, 35; accord. Hobbs *v.* Henning (1864), 17 C. B. N. S. 791; 34 L. J. C. P. 117. If the want of a proper document was not the ground of condemnation in Carruthers *v.* Gray, even the shipowner would not have been prevented thereby from recovering. *Ante*, ss. 728, 729.

(*f*) Dawson *v.* Atty (1806), 7 East, 366; see also Carruthers *v.* Gray (1811), 3 Camp. 142; *S. C.* (1812), 15 East, 35.

(*g*) In Bell *v.* Carstairs (1811), 14 East, 393.

(*h*) 1 Marshall, Ins. 173, n. (*a*). See also the remarks of Mansfield, C. J., in Le Cheminant *v.* Pearson (1812), 4 Taunt. 379.

(*i*) Phillips, Ins. vol. i. p. 344, 2nd ed. In the 3rd edition Phillips appears to modify his objection, as stated in the text, and admits that, as regards the mere shipper, it is going far enough to put the case upon the ground of representation and concealment—*i. e.*, to make it the shipper's duty to disclose want of documents, &c., if known to him and not to the underwriter. 1 Phillips, s. 746.

Sect. 731. there seem good grounds for holding that the implied condition that the ship shall be properly documented stands on a wholly different footing from the implied warranty of seaworthiness, these objections, which proceed upon the assumption of a complete analogy between the two cases, are not entitled to much weight. The distinction taken by Lord Ellenborough (and since adopted by the Court of Common Pleas (*j*)) seems to rest on a very satisfactory foundation, nor does there appear any reason why the implied condition as to proofs of national character ought to be more widely extended.

Of carrying simulated papers and false clearances.

732. Owing to the unexampled difficulties thrown in the way of English commerce during the great French wars, it became necessary to carry on trade with the Continent by the aid of simulated papers: yet our Courts uniformly held that the sentences of foreign tribunals of prize, expressly proceeding on the ground of the ship's carrying simulated papers, were conclusive to discharge the underwriter from his liability, except where there was an express leave given in the policy to carry them.

Without leave of the underwriter.

Thus, where a British ship sailed from London for the Baltic and was condemned in a Russian Prize Court on the ground of carrying simulated papers, Lord Ellenborough and the Court of King's Bench held that, as the policy contained no liberty to carry such papers, the assured could not recover, although it was notorious that the trade sought to be protected by the policy could not be carried on without such papers, so that the fact of having them on board actually tended to diminish the risk (*k*): and the decision of the Court was the same where the fact of carrying such simulated

(*j*) Hobbs *v.* Henning, *supra.*

(*k*) Horneyer *v.* Lushington (1812), 15 East, 46; (1811), 3 Camp. 85; see also *S. P.*, Fomin *v.* Oswell (1813), 3 Camp. 357; 1 M. & S. 393. These cases resolve in the affirmative a point left open by the Court of Common Pleas in Steel *v.* Lacy (1810), 3 Taunt. 285—viz., whether it is necessary to have permission in the policy to carry simulated papers, in cases where it is notorious that the trade cannot be carried on without them.

papers appeared by the sentence to be at least one of the efficient causes of condemnation (*l*). Sect. 732.

Of course, if the underwriters have agreed to the insertion on the face of the policy of a licence to carry simulated papers, they are not discharged from their liability by a condemnation which proceeded on this ground. *Aliter*, where leave to that effect is reserved.

Thus, where an American ship having sailed from London on a Baltic risk under a policy which contained an express licence "to carry simulated papers," was subsequently condemned by the sentence of a Danish Prize Court, which although it recited many other motives of condemnation, yet proceeded mainly upon the ground of the ship's having carried simulated papers, Lord Ellenborough and the Court of King's Bench held that the underwriters were not discharged from their liability (*m*).

733. Another warranty or condition implied by the law in the policy is that the adventure insured shall be in its own nature, and in the manner and means by which it is pursued, in accordance with law. But the importance of the subject, the modifications that affect it, and the various classes of illegal acts that require consideration, make it desirable to treat of the whole subject of illegality in a separate chapter. Legality of the adventure.

(*l*) Oswell *v.* Vigne (1812), 15 East, 70.

(*m*) Bell *v.* Bromfield (1812), 15 East, 364.

CHAPTER V.

ILLEGALITY OF THE RISK.

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Division of the subject.

734. No species of property or interest at risk on a sea venture can be the subject of a valid contract of marine insurance, if the course of trade, or the voyage, in the prosecution of which it is so exposed to risk, be in contravention either of the laws or the war policy of the country of the insurer. We shall treat of these several kinds of illegal risks in their order, after having first stated generally how the illegality of the risk affects the rights and liabilities of the parties to the policy.

There is a third class of illegal risks, however, in respect of which this term "illegality" is used in a very modified signification. In these cases this term denominates such a contravention of international law in respect of other parties as entitles them legally to take and confiscate the property embarked in the adventure. At the same time, this right in these others is not incompatible with the existence of a right

in the adventurers, under a different law, to pursue the adventure on which they were engaged when their property was confiscated. These are the conflicting rights of peace and war in presence of each other: the neutral, in virtue of the former, being justified in prosecuting the objects of commercial enterprise; the belligerent, in enforcing the latter, if such commercial pursuits are in effect an intervention in subsisting war. A policy on such an adventure is not necessarily invalid, provided the underwriter was informed of the aggravated nature of the risk which he was assuming, and that it was not assumed in contravention of the war policy of his own Government. Sect. 734.

We shall advert to this modified view of illegality before the close of the chapter; meanwhile we proceed to consider illegality in its proper signification and in its effect upon the contract of marine insurance.

General doctrine of the illegality of the risk as it affects the policy.

735. "Where a voyage is illegal," says Tindal, C.J., "an insurance upon it is invalid; for it would be singular if, the original contract being invalid and incapable to be enforced, a collateral contract founded upon it could be enforced" (*a*). Such is the rule and the reason for it. The following decided points will show within what limitations the rule applies.

Illegality as to part of an entire voyage discharges the underwriter as to the whole.

If the voyage be an integral and entire voyage under charter-party or otherwise, any illegality at the commencement or in the course of it will make the whole illegal; so that the assured cannot recover on a policy effected to protect any part of it, although there may have been no illegality in the part of the voyage so insured (*b*). Thus, if a ship be

(*a*) Redmond *v.* Smith (1844), 7 M. & Gr. 457, 474.

(*b*) Admitted by Lord Kenyon in Wilson *v.* Marryatt (1798), 8 T. R. 46, and expressly ruled by him at N. P. in Bird *v.* Pigou (1800), 2 Selw. N. P. 932, 13th ed. This statement of the law has been criticized by Story, J., and Phillips (see 1 Phillips, s. 231), who consider that it is "difficult in point of principle to distinguish an illegality in a former voyage and that in a prior part of the same voyage, when the policy covers only the part which is legal."

Sect. 735. chartered for one entire voyage "from London to Madeira and thence to the East Indies," and a policy be effected on ship only "from Madeira to the East Indies," then, if the ship have been engaged in smuggling or any other illegal act between London and Madeira, this will prevent the assured from recovering on the policy "from Madeira to the East Indies," although there may have been no illegality in this latter stage of the voyage.

Query, where a voyage consists of distinct stages separately insured.

736. An attempt was made on one occasion to carry this principle still further, and it was contended that if an entire voyage under a charter-party consist of two distinct stages separately insured, an illegality on the latter stage of the voyage will vitiate a policy on the former, although in itself quite free from the taint of illegality: *e.g.*, supposing a ship to be chartered for a voyage out and home, as from A. to B., and back again to A., and two separate policies to be effected, one on the outward and another on the homeward passage; it was urged that although there might be no illegality on the outward passage, yet the policy thereon would be vitiated by a subsequent illegality on the homeward passage. The Court gave no express decision on the point, but the inclination of their opinion seemed decidedly unfavourable to the doctrine thus advanced (*c*).

A contingent illegality on the homeward passage will not vitiate the outward policy.

At all events where, as in the case before them, the loss had occurred before the commencement of the risk under the homeward policy, so that no illegality had, in fact, taken place on the homeward passage, and there was nothing to show that the master might not before sailing on it have taken steps for performing such passage with all due legal requisites, they held that there was no pretence for saying that such contemplated, or rather contingent, illegality on the

(*c*) Sewell *v.* Royal Exch. Ass. Co. (1813), 4 Taunt. 855. Gibbs, J., at the trial, seems to have been clear that the homeward voyage would not contaminate the outward voyage (see *ibid.* 858), and Sir J. Mansfield, in giving judgment, shows clearly the bias of his opinion to be the same way. (*Ibid.* 864.)

homeward passage could vitiate the policy on the outward passage (*d*). Sect. 736.

737. Of course, if the voyage of the ship is not thus integral and entire, but the case is one in which either several distinct voyages of the ship are insured in several distinct policies, or, out of several distinct voyages of the ship, only one is insured in the policy on which the action is brought, an illegality on any such other voyages cannot possibly affect the claims of the assured. The only question is, was there any illegality in the course of the very voyage insured in the policy? Where the voyages are distinct the illegality must be on the voyage insured.

Thus, where it appeared that an American ship had sailed from London to Canton, and thence back to Europe, but it was distinctly found that the voyage from London to Canton and that from Canton to Europe were two distinct voyages, it was held that an illegality committed in the course of the ship's voyage between London and Canton could not possibly affect a policy intended to protect the voyage from Canton to Europe (*e*). Bird *v.* Appleton.

738. In case of a policy on a ship "at and from," if there be any illegality in the risk while the ship is at the place, that will vitiate the policy though the illegality may cease before the ship sails. If the policy be "at and from" an illegality at the port vitiates the policy.

Thus, where a policy was effected on an American ship "at and from Canton to Hamburg," and it appeared that the ship on arriving at Canton, and for a short time while she lay in harbour there (consequently after the inception of the risk on ship under this policy), had on board an illegal cargo, which she had taken in at Bombay for sale at Canton, in the course of a separate and distinct voyage: this was held to vitiate the policy on the ship, though she disposed of all her illegal cargo at Canton, and sailed thence for Hamburg with

(*d*) Sewell *v.* Royal Exch. Ass. Co. (1813), 4 Taunt. 855. See Waugh *v.* Morris (1873), L. R. 8 Q. B. 202, an action on a charter-party.

(*e*) Bird *v.* Appleton (1800), 8 T. R. 562.

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another (*f*). The principle is, that "an illegal cargo on board but for an hour after a policy attaches will avoid that policy and discharge the underwriters from all subsequent liability" (*g*).

Policy not void, because on cargo bought with the proceeds of an illegal cargo.

In the same case a policy was effected for the same voyage, *i.e.*, "at and from Canton to Hamburg," on goods which were purchased at Canton for the homeward voyage partly with the proceeds of the illegal cargo, and none of which were, consequently, shipped on board till the whole of the illegal cargo was unloaded: this policy the Court held to be good; the risk on the goods under it did not attach till they were loaded on board, when all illegality was at an end by the prior discharge of the illegal cargo. "The voyage homeward from Canton," says Lord Kenyon, "being found to be a separate and distinct voyage from that to Canton, the homeward voyage cannot be affected by the former outward voyage" (*h*).

With regard to the objection that the risk on the goods was illegal, because they had been purchased with the proceeds of an illegal cargo taken on board in the course of a separate adventure, Lord Kenyon and the rest of the Court wholly refused to entertain it. "In such a case as the present," says Lawrence, J., "we cannot inquire into the means by which the merchant gains the money that is afterwards laid out in the purchase of goods" (*i*).

Result of the cases.

739. The positions, therefore, derivable from the cases appear to be: 1. That any illegality in the prior stages or at the outset of an integral voyage vitiates a policy, though effected only to protect some later stage of it on which there is no illegality. 2. That an illegality in any part of an entire risk, or voyage insured, vitiates the insurance as to the whole of it. 3. That the illegality of a wholly distinct and

(*f*) Bird *v.* Appleton (1800), 8 T. R. 562.

(*g*) 1 Marshall, Ins. 68.

(*h*) Bird *v.* Appleton (1800), 8 T. R. 566.

(*i*) Bird *v.* Appleton (1800), 8 T. R. 569.

separate voyage can have no effect on the voyage described in the policy. Sect. 739.

740. Where the policy is thus avoided in consequence of the illegality of the risk, the underwriter is entirely discharged from all liability, and this, although he himself was aware of the illegal nature of the adventure (*j*). Nor is the assured (even though a foreigner) entitled to any return of premium (*k*), except under very special circumstances, from which the Court may fairly infer that at the time of making the policy he was not, nor, in fact, could have been aware of the real nature of the transaction (*l*). And the circumstances must be very special to induce the Court to depart from the general rule based on the broad and intelligible principle, that where the contract is founded on a consideration clearly illegal, neither party shall be allowed a *locus standi* so as to receive any assistance in a Court of Justice (*m*). Generally no return of premium.

In further application of this principle the Courts have also determined that, where the premiums have not been paid, the underwriter cannot sue the broker for them in cases where the policy, for effecting which they are claimed, is in its language large enough to comprise an illegal adventure, and was intended by the assured to be applied thereto (*n*). Underwriter insuring illegal risk cannot sue for premiums.

In the case last cited, in reference to a point that had been made in the argument, viz., that consistently with the words of the policy the adventure might have been legal, and the underwriter had no means of knowing that it was not, Lord Ellenborough said: "The policies being large enough to cover an illegal adventure, and an illegal adventure being, in fact,

(*j*) Bynkershoek, 1 Quæst. Juris Public. lib. i. c. 21. Roccus (No. 21) mistakenly advanced the opposite doctrine. See Lord Mansfield's judgment in Holman *v.* Johnson (1775), 1 Cowp. 343.

(*k*) Vandyck *v.* Hewitt (1800), 1 East, 96; Lubbock *v.* Potts (1806), 7 East, 449; Palyart *v.* Leckie (1817), 6 M. & S. 290; see *post*, Chapter on Return of Premium.

(*l*) Oom *v.* Bruce (1810), 12 East, 225; Hentig *v.* Staniforth (1816), 5 M. & S. 122; see *post*, Chapter on Return of Premium.

(*m*) Per Lord Ellenborough in Palyart *v.* Leckie (1817), 6 M. & S. 293.

(*n*) Jenkins *v.* Power (1817), 6 M. & S. 282.

Sect. 740. intended to be covered by them, if the plaintiff (the underwriter) really meant to protect that adventure, his subscription was illegal, and consequently his present demand, being grounded on an illegal consideration, cannot be sustained. If he did not mean to protect that adventure, but supposed that some other lawful adventure was intended by the assured, then admitting the subscription to have been an innocent act on his part, there will be no consideration at all to support his present demand" (*o*).

Principles on which these decisions depend.

The principles on which the foregoing decisions depend are —1. That no Court of Justice can interpose to assist either of the parties to an illegal contract; 2. That *in pari delicto potior est conditio possidentis.*

Voyages illegal by the revenue laws: smuggling.

741. The most extensive branch of illegal traffic is that which is prohibited by the revenue laws of the state; in other words, the smuggling trade.

It is a clear and settled principle, that an insurance on property intended to be employed in carrying on trading adventures contrary to the revenue laws of the state where the contract is to be performed, or is sought to be enforced, is void. No Court, consistently with its duty, can lend its aid to carry into execution a contract which involves a violation of the laws that Court is bound to administer (*p*). All insurances, therefore, made or sought to be enforced in this country on goods, the exportation or importation of which is prohibited by the revenue laws of the United Kingdom, are unenforceable on the principle just laid down (*q*).

But this country pays no attention to revenue laws of

742. The same respect has not been required by our Courts to be paid to the revenue laws of foreign states. It was long ago declared by Lord Mansfield, and has never since been

(*o*) Per Lord Ellenborough in Jenkins *v.* Power (1817), 6 M. & S. 289.

(*p*) *Post*, s. 744; 1 Emerigon, c. vii.; s. 5, p. 215; 3 Kent, Com. 262.

(*q*) The importation and exportation of goods into and from the United Kingdom are chiefly regulated by the Customs Laws Consolidation Act, 1876 (39 & 40 Vict. c. 36), which has, however, been greatly modified by a large number of later Acts.

Sect. 742. foreign states.

doubted, to be the clear rule of English law, that this country "pays no attention to the revenue laws of another state," and, therefore, that no insurances can be void merely because effected on property embarked in enterprises which those laws would prohibit (*r*). So far has this principle been carried in English law, that Lord Mansfield in one case held that an insurance on an adventure, in which it was manifestly and avowedly intended to defraud the revenue of a foreign state, was not illegal, though fictitious papers were fabricated for the purpose of carrying out the fraud (*s*).

The legislature itself appears to have sanctioned the same principle by permitting the practice of insuring "without further proof of interest than the policy," to continue in force for the purpose of facilitating the smuggling trade in bullion with the colonies of Spain and Portugal; and this by a clause of the very Act which abolished the practice for almost all other purposes as impolitic and immoral (*t*).

Foreign writers as to the morality of the rule.

743. Grave questions have been raised by many able writers as to the morality and justice of this rule of law. In France, Valin (*u*), Emerigon (*x*), and Pardessus (*y*) admit

(*r*) Lever *v.* Fletcher (1780), 1 Park, Ins. 506; see also Planché *v.* Fletcher (1779), 1 Dougl. 251. Arnould stated in the text that Lord Mansfield ruled in Lever *v.* Fletcher that an insurance was valid "where the trade insured was carried on, not only in fraud of the revenue laws of a foreign state, but even against the express conditions of a treaty to which Great Britain and the foreign state were parties." This is certainly stated in Park's report of Lord Mansfield's judgment, the words being "every trading with the subjects of Spain is illicit by the Treaty of Paris." Mr. Maclachlan says, in a long note (Arnould, 6th ed. vol. ii. p. 693), that there is no such condition in the Treaty of Paris of 1763, and he suggests a different interpretation of Lord Mansfield's judgment, which as reported is by no means clear. As, however, Arnould questions the soundness of Lord Mansfield's decision as he understood it (see 2nd ed. p. 743, n. (*t*)), and as it is contrary to the later decisions that treaties are part of the law of the states who are parties to them (see *post*, s. 745), the editors do not think it necessary to reprint Mr. Maclachlan's note.

(*s*) Planché *v.* Fletcher (1779), 1 Dougl. 251.

(*t*) The clause is the third section of the 19 Geo. 2, c. 37.

(*u*) 2 Valin, Comment. on Ordonnance de la Marine, tit. vi. art. 49.

(*x*) 1 Emerigon, c. viii. s. 5, p. 216.

(*y*) 3 Pardessus, Droit Com. art. 772.

Sect. 743. such insurances to be valid, but ground their validity chiefly on the concurrent usage of all commercial nations. Pothier, on abstract principles of morality, vehemently condemns the practice (*z*), and his views have been ably supported by Marshall in this country (*a*), and on the other side of the Atlantic by Chancellor Kent (*b*) and Story, J. (*c*). The reasonings, however, adduced by these eminent persons against the rule as established in this country by Lord Mansfield, and universally acted on in practice, did not appear to Arnould to be convincing (*d*).

The underwriter must be informed of the risk.

744. The ship or the goods thus engaged in the foreign smuggling trade are of course liable to seizure and confiscation by the foreign government. This liability materially increases the risk of the adventure, and ought, therefore, on the plainest principles of equity, to be disclosed to the underwriter at the time of effecting the insurance. Hence the rule is well established that the assured cannot recover on policies effected for the purpose of protecting a trade prohibited by foreign revenue laws, unless the underwriter were fully informed of the nature of the risk (*e*).

Effect of *lex loci contractus*.

Pardessus has raised the question whether, if the contract of insurance were made in the country whose revenue laws are violated by the traffic it is effected to protect, such contract can nevertheless be enforced in the country of the assured: he is clearly of opinion that it might (*f*). No such general rule can be said to exist in this country. *Primâ facie*, according to English law, a contract is governed by the law of the

(*z*) Traité d'Assurance, No. 58.

(*a*) 1 Marshall, Ins. 55.

(*b*) 3 Kent, Com. 263—265.

(*c*) Story, Conflict of Laws, s. 256, and on Agency, ss. 195 *et seq.*

(*d*) 2nd ed. vol. ii. p. 744, citing Lampredi, Del Commercio dei Neutrali, Pt. i. s. 1, cited in Azuni, Diritto Marittimo dell' Europa, Pt. ii. c. 2, art. i. vol. ii. p. 47—50; 1 Emerigon, c. vii. s. 5, p. 216; and Pardessus, Droit Com. tom. 3, No. 772, and tom. 6, No. 1492.

(*e*) Emerigon, in the opinion with which he favoured Valin upon this question, and which is inserted in that writer's commentary on the Ord. de la Marine (2 Valin, tit. vi. art. 49), gives the authorities by which this rule is established. See also Fracis *v.* Sea Ins. Co. (1898), 3 Com. Cas. 229, *infra*.

(*f*) 6 Pardessus, Droit Com. art. 1492.

country where it is made; but if it is to be performed in another country, the parties will be deemed to have intended it to be governed by the law of the latter country (*g*). Sect. 744.

Prohibition by obsolete foreign law.

The question whether an insurance illegal by the law of a foreign state is void in this country was raised, but not determined, in a recent case. The policy was on arms on a voyage to Persia, and by Persian law their importation was forbidden. It was, however, proved that this law had never been enforced, and that arms had invariably been allowed to be imported into Persia on payment of duty; and Bigham, J., held that under the law of Persia, as it was in fact administered, the adventure was not illegal (*h*).

Illegality under trade and navigation laws.

745. As all traffic and all voyages carried on in contravention of the Acts passed for regulating the trade and navigation of the United Empire are illegal, it follows, on the same principles, that all insurances intended for their protection are void. Of these Acts the most celebrated were the Navigation Laws, now repealed. The principal Act in force for regulating the navigation of the United Kingdom is the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), by which the previous Merchant Shipping Acts were repealed and consolidated. Reference may also be made under this head to the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), as amended by a number of later Acts, and to the Pacific Islanders Protection Acts, 1872 & 1875 (35 & 36 Vict. c. 19; 38 & 39 Vict. c. 51).

When, however, the adventure is not itself unlawful, the fact that in the performance of the voyage a law relative to navigation is contravened does not make the insurance void, unless the assured was aware of the illegality at the time when the insurance was made, or was himself a party to the illegality (*i*). Mere knowledge on the part of the assured

(*g*) See Chatenay *v.* Brazilian Submarine Telegraph Co., [1891] 1 Q. B. 79; Dicey, Conflict of Laws, 569—571.

(*h*) Fracis *v.* Sea Ins. Co. (1898), 3 Com. Cas. 229.

(*i*) Farmer *v.* Legg (1797), 7 T. R. 186; Carstairs *v.* Allnutt (1813), 3

Sect. 745. that there is some illegality in the performance of the voyage does not make him a party to the illegality, when he has no control over the navigation of the ship (*i*).

This principle applies when the innocent assured is the owner of the ship, as well as when the insurance is made for other parties (*k*), and an authority from the owner to the master of the ship to do an illegal act will not be implied from the general powers of the latter. Thus, where the master of a ship, bound on a voyage from British North America to England, after the 1st of September, loaded part of a timber cargo on deck contrary to the provisions of the Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107), and sailed without the certificate required by that statute, the Exchequer Chamber held that the owner could recover on a policy on the freight of the voyage, though the master had a general authority to stow the cargo (*l*).

Even where the consequence of an illegality in the performance of the voyage was the condemnation of the ship for a breach of the Pacific Islanders Protection Act, 1872 (35 & 36 Vict. c. 19), it was held that an insurance by the innocent shipowner was not void, and that he could recover as for a loss by barratry (*m*).

Treaties of commerce part of the law of the land.

746. Besides the Acts of trade and navigation already referred to, our commercial intercourse with different states is mainly regulated by commercial treaties, which have at different times been entered into between our own country and the principal maritime states of Europe and America.

"Every treaty," says Lord Stowell, "is part of the private law of each of the countries which are parties to it, and is as

Camp. 497; Metcalfe *v.* Parry (1814), 4 Camp. 125; Cunard *v.* Hyde (1858), E. B. & E. 670; 27 L. J. Q. B. 408; Cunard *v.* Hyde (1859), 2 E. & E. 1; 29 L. J. Q. B. 6; Dudgeon *v.* Pembroke (1874), L. R. 9 Q. B. 581; Wilson *v.* Rankin (1865), L. R. 1 Q. B. 162. See also Hobbs *v.* Henning (1865), 17 C. B. N. S. 791; 34 L. J. C. P. 117; Law *v.* Hollingworth (1797), 7 T. R. 160, is not consistent with the later decisions; see *ante*, ss. 703, 704.

(*i*) Cunard *v.* Hyde (1858), *supra*.

(*k*) Dudgeon *v.* Pembroke, *supra*.

(*l*) Wilson *v.* Rankin, *supra*.

(*m*) Australasian Ins. Co. *v.* Jackson (1875), 33 L. T. N. S. 286.

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binding on the subjects of each as any part of their own municipal laws" (*n*). Consequently, all insurances on ships or goods, navigated or conveyed contrary to the provisions of any commercial treaty subsisting between our own country and any foreign state, are inoperative and void, on the same principle as those effected on trading adventures which contravene the positive prohibitions of our own statutes (*o*).

Enactments for a collateral purpose do not affect the insurance.

747. It is where the Acts of Parliament or treaty regulations form part of the general commercial policy of the empire that a violation of their provisions renders illegal the traffic or voyage, and avoids the insurances which are carried on or effected in contravention of their terms. The same consequences, it has been held, do not necessarily follow from the violation of Acts of Parliament, which, though connected with the trade and navigation of the country, are yet passed for a collateral purpose. Thus the want of a written agreement with the crew, in the form and of the contents required by the Merchant Seamen's Act (5 & 6 Will. 4, c. 19), was held not to render a voyage illegal, and consequently an insurance thereon void (*p*), nor the ship unseaworthy (*q*).

Illegality under the Convoy Acts.

748. During the great maritime wars arising out of the French revolution our government passed two Acts, one in 1797 (*r*) and a second, re-enacting the former, on the renewal of the war, in 1802 (*s*), with a view of compelling all ships not expressly excepted in the Act to sail with convoy, it having been found that, owing to their neglect to do so, our trade and shipping had suffered to a very considerable extent. These Acts, having been only passed to continue in force during the hostilities then existing, expired, the first on the ratification of the peace of Amiens, and the second on the

(*n*) In the case of The Eenrom (1799), 2 C. Rob. 1, 6.

(*o*) See Wilson *v.* Marryatt (1798), 8 T. R. 31; *S. C.* in the Ex. Ch. (1799), 1 B. & P. 430; and Bird *v.* Appleton (1800), 8 T. R. 562.

(*p*) Redmond *v.* Smith (1844), 7 M. & Gr. 457.

(*q*) Per Tindal, C. J., 7 M. & Gr. 474, 475.

(*r*) 38 Geo. 3, c. 76.

(*s*) 43 Geo. 3, c. 57.

Sect. 748. termination of the war in 1814. Sections 3 and 4 of the earlier Act imposed penalties for infringements, and expressly provided that in such case the insurance should be void and the premium not recoverable back.

Illegality under other occasional statutes.

749. Even in the absence of a provision specially avoiding the insurance, a policy on any subject for a voyage or trading, contravening the terms of occasional Acts of Parliament, is void.

Johnson v. Sutton.

Thus, where during the first American war an Act was passed expressly prohibiting all trading with the province of New York except in provisions for the use of the British forces, and then only provided a licence were produced authorizing their export, an insurance effected on unlicensed goods on board a British ship, intended for the New York market, was held illegal and void under this statute, although the commander of the forces had by proclamation (unauthorized, however, by the statute) allowed the entry into New York of such unlicensed goods (*t*).

Parkin v. Dick.

Where, during the French war, an Act had been passed empowering his Majesty to prohibit the exportation of all naval stores without a licence, and an Order of Council was accordingly made, in which such exportation was prohibited under penalty of forfeiting the goods themselves and treble their value; it was held that a policy effected "on goods to be thereafter specified" for an outward voyage was rendered wholly void by the assured including in the specification afterwards made up by him some goods, the exportation of which was prohibited by this Order in Council, he having obtained no licence authorizing their exportation (*u*).

Lord Ellenborough in this case declared that, although the prohibited goods formed an exceedingly small portion of the

(*t*) Johnston *v.* Sutton (1779), 1 Dougl. 254. The Act was 16 Geo. 3, c. 5 (1775).

(*u*) Parkin *v.* Dick (1809), 2 Camp. 221; *S. C.* 11 East, 502. Contrast Hagedorn *v.* Bazett (1813), 2 M. & S. 100, where, although goods were included in one policy, yet as they in fact belonged to different owners, only one of whom was an enemy, the insurance was held to be valid except as to the enemy's parcel.

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whole venture, yet, as the whole was sought to be covered by one entire contract of insurance, such contract was entirely vitiated. "I have no scales," said his Lordship, "to weigh degrees of illegality" (*w*).

Secus, where a licence has been obtained.

750. In these cases no licence at all had been procured for the exportation of the prohibited goods, and all were insured under one policy; where, however, such licence had been obtained by the assured, the policy of insurance was held valid, notwithstanding prohibited goods of other persons had been put on board the same ship, but not covered by the same policy (*x*). In another case, where the assured had shipped more prohibited goods than the licence authorized, the insurance was held good as to those prohibited goods protected by the licence, and void as to the excess (*y*).

Informality in performing conditions of licence vitiates the entire insurance.

In a later case, before Lord Tenterden in the King's Bench, an informality in performing the conditions on which a licence for exporting gunpowder had been granted was held to vitiate the entire insurance on a general cargo, all belonging to the same owner, and of which the gunpowder exported under the licence formed part (*z*). The ground of this decision was that the informality in question rendered the licence wholly void, so that the case stood on the same ground as though no licence at all had been procured, and therefore fell within the general principle established in the case of Parkin *v.* Dick.

Gibson *v.* Service.

The following curious case shows the extent to which this principle has been carried by the English Courts:—A British ship had been permitted to take out a cargo of arms and gunpowder, on giving a bond, as required by law (*a*), that the same should be expended in trade on the coast of Africa, whither she was bound. An American ship, in pursuance of a previous agreement made before she sailed, met her in the river Congo in order to take the arms and gunpowder out of

(*w*) 2 Camp. 222.
(*x*) Pieschell *v.* Allnutt (1813), 4 Taunt. 792.
(*y*) Keir *v.* Andrade (1816), 6 Taunt. 498. See also Butter *v.* Allnutt (1816), 1 Stark. 222; Shiffner *v.* Gordon (1810), 12 East, 296.
(*z*) Camelo *v.* Britten (1820), 4 B. & Ald. 184.
(*a*) 33 Geo. 3, c. 2, s. 4.

Sect. 750. her there and carry them to America. In order to protect this enterprise an insurance was effected on the American ship "at and from the river Congo to Charleston:" it was held, that this insurance was illegal and void, on the ground that the American ship was at the river Congo, in order to violate the laws of the country where the contract of insurance was made, and sought to be enforced (*b*).

Voyage legal in fact but not in terms.

751. In the following case a voyage was held legal, because justified by its object, though contravening the strict terms of an Order in Council:—Goods were insured on a voyage "from London to Helmsberg (a Swedish port), the Sound, and Copenhagen, all or either:" the ship sailed under false clearances for the Swedish port, but with a real destination for Copenhagen, all intercourse with which place was strictly prohibited by certain Orders in Council then in force; as, however, it was proved, to the satisfaction of the jury, that the real object of the venture was to carry provisions to the British armament, then supposed to be at Copenhagen, and not to defeat the Order in Council by trading with the enemy, the Court held that the voyage was not illegal; they also held, that, though the taking out a clearance for a place to which it was not intended to go subjected the party to a penalty, under the stat. 13 & 14 Car. 2, c. 11, s. 3, yet there was nothing in the Act, on the principle already referred to, to make the voyage illegal (*c*).

Voyages in contravention of embargo.

752. The sovereign power of every state has in time of war a clear right to establish, by proclamation or otherwise, an embargo on all ships in any port of its dominions; all insurances, therefore, effected on any ships, whether the property of foreigners or subjects, which sail in contravention of such embargo will be deemed in that state to be illegal and void. Thus, where the British Government in time of war had laid an embargo on all ships sailing with provisions from

(*b*) Gibson *v.* Service (1814), 5 Taunt. 433; 1 Marshall's R. 119; *S. C.* Gibson *v.* Mair (1813), *ibid.* 39.

(*c*) Atkinson *v.* Abbott (1808), 1 Camp. 535; (1809), 11 East, 135.

any port in Ireland, an insurance effected on a neutral (Venetian) ship, in contravention of such embargo, was on this ground held void (*d*). Sect. 752.

753. It is generally laid down by writers on the laws of war that the object of every belligerent state in time of war is to inflict on the enemy all the mischief, and deprive him of all the advantage, which the law of nations will permit. Voyage illegal because against our war policy.

As one of the main sources of wealth and strength to every mercantile state consists in its maritime commerce, the law of nations has hitherto permitted each belligerent to endeavour, by every effort, to impede and annihilate such commerce, by destroying or making prize of the enemy's ships and merchandise; and, upon the same principles, the municipal or common law of every state has declared all insurances by its own subjects upon such ships or merchandise to be void. Insurances on enemy's property void.

We have elsewhere had occasion to advert to the course of decisions by which our Courts established that insurances by or on behalf of alien enemies were wholly illegal and void (*e*). We have seen it progressively decided that alien enemies could not sue on such contracts in our Courts, either by themselves or their agents (*f*); that such insurances were in themselves illegal, and therefore that, although effected before the breaking out of hostilities, yet they could not protect an enemy against the consequences of British capture after war had broken out (*g*); that no action, consequently, could be maintained upon them, even after the restoration of peace, in respect of such loss, or any other that had taken place during hostilities (*h*); although, supposing both the policy to have been effected and the loss to have accrued before the commencement of hostilities, the right of the alien

(*d*) **Delmada** *v.* **Motteux** (1785), 1 T. R. 85, n.; 1 Park, Ins. 505.

(*e*) *Ante*, Part I. Chap. V.

(*f*) **Brandon** *v.* **Nesbitt** (1794), 6 T. R. 23; **Bristow** *v.* **Towers** (1794), *ibid.* 35.

(*g*) **Furtado** *v.* **Rogers** (1802), 3 B. & P. 191.

(*h*) *Ibid.*; **Brandon** *v.* **Curling** (1803), 4 East, 410; **Gamba** *v.* **Le Mesurier** (1803), *ibid.* 407.

Sect. 753. enemy to sue upon such policy was only suspended during the continuance of war, and would revive upon its close (*i*).

Insurances on British trade with the enemy void.

754. In the decisions just referred to the insurance was generally effected on behalf of enemies, to protect their property during war from liability to British capture or other casualties: in these we are now to consider the design was to protect the interest of British subjects, during war, in trade carried on with the enemy without the king's licence. The question, therefore, involved in them was, whether trading with the enemy during war, without licence, was illegal in British subjects.

Potts *v.* Bell.

The question came before the Courts of common law in the case of an insurance effected by, and for, a British subject in time of war, to protect his interest in goods purchased by his agent of an enemy in the enemy's country, and shipped thence for England without a licence.

The Court of Common Pleas decided that this insurance was legal (*k*); but the Court of King's Bench, after two arguments, first by common lawyers and afterwards by civilians, and on the maturest deliberation, unanimously held that such insurance was wholly illegal and void (*l*).

This case, and that of the "Hoop," decided by Lord Stowell in the Admiralty Court shortly before it, have established the rule that all trading by the subjects of this country in time of war, without a licence, with the subjects, to the country, or by means of the property, of the enemy, is wholly illegal; and all insurance to protect such trading absolutely void.

British subject domiciled in a neutral state has the privileges of neutrality.

755. A British subject, however, domiciled in a foreign country becomes, we have seen (*m*), for all commercial purposes, the subject of the foreign state; and he may, if it be a

(*i*) Flindt *v.* Waters (1812), 15 East, 260, 266; Harman *v.* Kingston (1811), 3 Camp. 152; Bolton *v.* Dobree (1808), 2 Camp. 163. Cf. Hagedorn *v.* Bazett (1813), 2 M. & S. 100.

(*k*) Bell *v.* Gilson (1798), 1 B. & P. 345.

(*l*) Potts *v.* Bell (1800), 8 T. R. 548.

(*m*) *Ante*, s. 93.

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Bell v. Reid.

Wilson v. Marryatt.

neutral state, legally trade even with the enemies of this country, and protect such trading by a policy effected here (*n*). He may effect a policy on trading carried on in a way which would be illegal for a British subject, but is legalized by treaty for the subjects of the neutral country in which he is domiciled (*o*).

We have seen elsewhere (*p*) that if a neutral or a British subject continue in time of war to keep up a trading establishment in a hostile state, all his property connected with such hostile firm is liable to British seizure as enemy's property (*q*). There seems no doubt that all insurances effected here in time of war by a British subject, to protect such property, would be held wholly illegal and void.

Objection of illegal trading with the enemy must be taken in the first instance.

Where the underwriter intended to raise the objection that the insurance was void because effected to cover a trading with the enemy, it was held that he must take such objection in the first instance: where there was a verdict against him, the Court refused to grant him a new trial in order to avoid the contract on this ground (*r*).

The ship must have a distinct hostile destination at time of loss, to make the voyage illegal.

756. In order to avoid a policy on the ground that it was intended to protect a voyage to a hostile port, it must be clearly made out that the ship was bound for a distinct hostile destination at the time of loss. Thus, it has been held that a policy "to any port or ports in the Baltic" was legal, though some of those ports were hostile to this country, and no licence had been obtained; for it was not shown that the ship, when captured, was sailing for a hostile Baltic port (*s*).

(*n*) The Danaöus (1802), cited in 4 C. Rob. 255; Bell *v.* Reid, and Bell *v.* Buller (1812), 1 M. & S. 726.

(*o*) Wilson *v.* Marryatt (1798), 8 T. R. 31. This does not apply to those subjects who migrate into the neutral country *flagrante bello*. The Dos Hermanos (1817), 2 Wheat. S. C. R. 76.

(*p*) *Ante*, s. 97.

(*q*) The Vigilantia (1798), 1 C. Rob. 1; The Portland (1800), 3 C. Rob. 41.

(*r*) Gist *v.* Mason (1786), 1 T. R. 84.

(*s*) Wright *v.* Welbie (1819), 1 Chitt. 49; *S. P.* Anon. *ibid.* See also, as to insurance to any port or ports in the island of St. Domingo, when partly in possession of the French, partly of King Christophe, Johnson *v.* Greaves (1810), 2 Taunt.

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Insurance on goods of resident in a port of hostile occupation.

757. An insurance on goods to a friendly or neutral port, there to be delivered to a neutral, is valid though the neutral himself be resident in a port of hostile occupation (*t*).

When such ports deemed neutral.

During the unexampled circumstances of the great war, when Napoleon, by the Berlin and Milan decrees, endeavoured to exclude English commerce from all the ports of the Continent, our Courts were frequently called upon to decide as to the hostile or non-hostile character of ports which were occupied by the arms, or coerced by the power, of the conqueror who aspired, and almost attained, to an universal empire over Europe.

Our Courts were naturally desirous not to defeat any contracts made to protect British trade with ports so situated, where they could possibly be upheld in compliance with the known rules of the law of nations. The principle, accordingly, upon which they acted with respect to such ports was to treat them as neutral, and, consequently, all trading to them as legal, in all cases where they still preserved the forms of an independent neutral government, though the enemy might have such a body of troops stationed there as effectively to exercise the real powers of sovereignty.

Donaldson *v.* Thompson.

Thus, although there was an overwhelming Russian force in the island of Corfu, yet, as the flag of the Ionian republic still flew in its ports, and the republican government continued to appoint a port admiral and receive consuls from foreign states, Lord Ellenborough held that Corfu was neutral (*u*).

Hagedorn *v.* Bell.

Similarly, while Hamburg was in the military occupation of Davoust with an overwhelming French force, but the Senate of Hamburg still continued in the full exercise of sovereign civil authority, Lord Ellenborough and the Court of King's Bench held that merchants domiciled there were neutrals; for Hamburg, having still the forms of her

344; Blackburn *v.* Thompson (1811), 3 Camp. 61; Muller *v.* Thompson (1811), 2 Camp. 610, per Lord Ellenborough.

(*t*) Bromley *v.* Heseltine (1807), 1 Camp. 75.

(*u*) Donaldson *v.* Thompson (1808), 1 Camp. 429.

own government, must be regarded as a neutral port though under hostile occupation (*x*). Sect. 757.

So, in 1811, when our commerce was totally excluded from Prussia under the Berlin decree, and no diplomatic intercourse subsisted between the two states, Lord Ellenborough held that, in the absence of open hostility, Prussia was not to be considered in a state of war with this country, and therefore that an insurance effected on the property of a British subject shipped hence for a Prussian port was not illegal (*y*). Muller *v.* Thompson.

758. It is for the government of the country to determine in what relation any other country stands towards it. Wherever our government, in the course of the great war, by Order in Council, Proclamation, or other act of supreme authority, declared any ports in the colonial or other possessions of the enemy not to be hostile, or when such order, &c., though issued for another purpose, contained a recognition that there were such non-hostile ports, a trading with such ports, though not directly sanctioned or permitted by the Order, was held to be legal without a licence, and insurances effected to protect such trading were upheld as valid. This principle was illustrated by decisions of the Courts with regard to those ports in the island of St. Domingo in possession of King Christophe, then in a state of rebellion against our enemies the French; and it was held on more than one occasion, that trading between this country and such ports was valid without any licence (*z*). The Courts are ruled by the government.

The executive power of the state, being the sole and supreme arbiter of all questions relating to peace and war, may grant to any such of its subjects as it pleases any privilege or licence to trade with the enemy, or to hostile ports, on any terms and for any period that may appear expedient. The government may licence trading with the enemy.

(*x*) Hagedorn *v.* Bell (1813), 1 M. & S. 450.

(*y*) Muller *v.* Thompson (1811), 2 Camp. 610.

(*z*) Johnson *v.* Greaves (1810), 2 Taunt. 344; Blackburn *v.* Thompson (1811), 3 Camp. 61; see also Atkinson *v.* Abbott (1809), 11 East, 135.

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Illegality under the law of nations. Neutrality generally.

759. A neutral state is one which on the breaking out of war between any two or more powers continues in a state of peace, and wholly abstains from taking any part in the hostilities of the belligerents (*a*).

Such is the definition generally given of neutrality by the writers upon public law. The state of neutrality, in their view of it, rather imports the duty which a neutral owes to the belligerents, than the relative situation in which either of the belligerents may choose to place the neutral state. But it must not be forgotten that it belongs to every state to pronounce upon the continuance either of amity, hostility, or neutrality as between itself and any other state; and consequently there is no doubt that either belligerent may continue for his own purposes to treat any state as neutral, long after such state has ceased to observe towards him a strictly neutral conduct. Nations are not bound to take up every cause of just offence, nor are they of necessity to be considered as hostile to each other, if there be a sort of condonation on the one side, for the purpose of continuing commerce with the other, which has given just cause of offence. The term neutrality, in a more enlarged sense, may be extended to signify this kind of permitted relation between any two states, after the right to its continuance has been forfeited by one of them (*b*).

Principal duties of neutrals.

760. The following rules embody the most important duties of neutrality according to our Prize Law. Their infringement renders neutral voyages and neutral trading illegal from the belligerent point of view, and consequently, in the Courts of the belligerent state, avoids insurances designed to protect them:—

1. Neutrals must not, during the continuance of hostilities, furnish the enemy with warlike stores or other articles which

(*a*) Azuni, Diritto Marittimo dell' Europa, Pt. ii. c. 1, art. 2, vol. ii. pp. 11—18.

(*b*) See the judgment of Lord Ellenborough in Hagedorn *v.* Bell (1813), 1 M. & S. 450, 459.

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are directly ancillary to warlike purposes, and which are generally denominated contraband of war.

2. Neutrals must not engage in voyages or carry on traffic in violation of blockades, established by a belligerent state and maintained with an effective force.

3. Neutral states must not, in time of war, engage in the privileged colonial or coasting trade of the enemy, which in time of peace was not open to them, but solely confined to the subjects of the enemy state.

4. All neutral ships are liable in time of war to be searched by belligerent cruisers, in order to ascertain their national character and whether they are carrying on any traffic prohibited by the laws of war.

5. Enemy's goods are not protected from seizure by being carried in neutral ships, but so to carry them is no violation of neutrality, and imposes no forfeiture on the rest of the venture belonging to other owners.

This fifth rule is in accordance with the old-established law of nations; but the Declaration of Paris has introduced a different rule among the powers that have adhered thereto in these terms: "The neutral flag covers enemy's goods, with the exception of contraband of war."

In the case of a war between foreign states, our Courts recognise the rights of British subjects and other neutrals to carry on their trade with a belligerent (subject to the other belligerent's right of capture). Consequently the carriage of contraband goods, or voyages in breach of blockade, are not considered illegal (*c*); and it necessarily follows that insurances on such goods or voyages are not illegal (*d*). If, however,

(*c*) Ex parte Chavasse, In re Grazebrook, per Lord Westbury (1865), 34 L. J. Bank. 17; The Helen (1865), L. R. 1 A. & E. 1. See also The Santissima Trinidad (1822), 7 Wheaton, 283, and Richardson *v.* Maine Ins. Co. (1809), 6 Mass. 102.

(*d*) Duer maintains (vol. i. p. 755) that an insurance effected in a neutral country on a voyage to a blockaded port is illegal, and relies on Harratt *v.* Wise (1829), 9 B. & Cr. 712; Naylor *v.* Taylor (1829), *ibid.* 715; and Medeiros *v.* Hill (1832), 8 Bing.

Sect. 760. the nature of the risk be not disclosed to the underwriter, he will be entitled to avoid the insurance on the ground of concealment.

We will consider briefly the consequences of some of the more important breaches of neutral duty, as far as they bear on the validity of contracts of marine insurance.

Insurances on articles contraband of war.

What articles are contraband.

Classification of Grotius.

761. The first and most important restriction is on the supply to a belligerent, by a neutral, of articles which are contraband of war. The natural question then is, what articles of commerce are contraband of war?

Grotius, in a classification which has been adopted in our Prize Law and that of the United States, divided all articles of commerce, with reference to this subject, into three classes:—(1) Articles such as arms and ammunition, which are of use in war only (*e*); (2) Articles which are of no use in war, but are only luxuries; (3) Raw materials which may be wrought up, or articles which may be used, for the purposes of war, as sailcloth, timber, pitch, sulphur, money, provisions, ships, &c., which are of use both in war and peace, and hence frequently termed articles *ancipitis usus* (*f*).

With regard to the two former classes there never has been any doubt; the *instrumenta belli*, which form the first class, have always been held contraband of war; and the articles of mere luxury never (*g*). It is with regard to the third class, or articles *ancipitis usus*, that the great uncertainty has prevailed; neutral states having uniformly contended in regard to these articles for freedom of commerce, while

231. These cases are, however, inconclusive, and cannot prevail against the later authorities.

(*e*) See also Azuni, Oggetti che possono immediatamente servire per la guerra, Diritto Marittimo, c. iii. art. 2, vol. ii. p. 181.

(*f*) Grotius, De Jure Belli, lib. iii. c. 1, s. v. § 1.

(*g*) Seneca thus illustrates what are meant by articles of luxury:—"I would not send my enemy gold or silver to pay his forces with, but I would allow him to have silks or marbles at his pleasure: he should not import soldiers or arms, but buffoons or musical instruments as many as he pleased: I would refuse him vessels of war, but not pleasure yachts or state barges." Cited by Grotius, *ibid.*

belligerents have insisted on the rigour of war. Attempts to fix a settled list of contraband articles were never so futile as at present, when the system and means of warfare are the subject of constant change (*h*). Sect. 761.

The Armed Neutrality of 1780, and again of 1801, was a confederation of the northern powers, headed by Russia, the object of which was to insist, amongst other things, that no articles should be deemed contraband of war, except those which were actually wrought up into the form of instruments of offensive or defensive warfare (*i*). Claims of the Armed Neutrality of 1780.

762. Some articles *ancipitis usus*, which are in their nature peculiarly serviceable in warfare, *e.g.*, materials directly used for ship-building, have invariably been held to be contraband. Articles *ancipitis usus*, when contraband.

The criterion whereby to determine whether other articles *ancipitis usus* are contraband or not, is the object for which they are destined—whether for the ordinary uses of life, or for military use? If the former, they are not contraband; if the latter, they are. The nature of the port to which they were sent used to be considered the best practical test of this question. If the port were a general commercial one, it was presumed that the articles were going for civil use, though occasionally a ship of war might be constructed in that port; but if the great predominating character of the port, like Brest in France, or Portsmouth in England, were that of a port of naval equipment, it was presumed that the articles were going for military use, though it was possible they The great question is, for what object are articles *ancipitis usus* destined? The best practical test of this question is the nature of the port to which they are sent.

(*h*) See Azuni, Diritto Marittimo, c. ii. art. 5, for the provisions of treaties on this subject, anterior to the French Revolution. It is the practice of many states, on the outbreak of hostilities in which they are engaged, to issue proclamations specifying the articles which they will treat as contraband.

(*i*) 2 Azuni, Diritto Marittimo, c. ii. art. 5, pp. 131, 137. The powers that acceded to the Armed Neutrality in 1780 were Russia, Sweden, Denmark, Prussia, Holland, France, Spain, Portugal, Naples, and the United States. The principles of the armed confederacy were abandoned in 1793 by the naval powers of Europe; in 1801 they were attempted to be revived, but the attempt was immediately repressed by England, and in the course of that year finally abandoned: 1 Kent, Com. 126, 127.

Sect. 762. might have been applied to civil consumption (*k*). This test has, however, lost much of its worth in this age of railway conveyance, when in most civilized countries goods can easily be transported by land from one place to another (*l*).

Enumeration of articles held to be contraband of war.

763. Ships, naval stores, timber, and all other materials which serve directly for the purposes of ship-building, have generally been held to be contraband of war, unless excepted by particular treaties (*m*).

Sail-cloth was held to be universally contraband, even when destined to ports of mere mercantile naval equipment (*n*). Tallow was held not to be contraband unless destined for a port, such as Brest, of mere hostile equipment (*n*). Cordage, generally speaking, was held to be contraband; and so were anchors and all other *armamenta navis* (*p*). Sulphur and saltpetre, as being main ingredients of gunpowder, have been almost invariably regarded as contraband, and were admitted to be so even by the terms of the Armed Neutrality (*q*). Tar, pitch, and hemp were held contraband by our Courts of Admiralty in the last French war (*r*).

(*k*) The Jonge Margaretha (1799), 1 C. Rob. 189; see also The Neptunus (1800), 3 C. Rob. 108.

(*l*) In The Zelden Rust (1805), 6 C. Rob. 93, Lord Stowell condemned cheese going to Corunna, on account of the proximity of that port to the naval port Ferrol in the same bay, and the impossibility of preventing the cheese from being immediately conveyed to the latter port, if allowed to enter the bay. It is submitted that the condemnation of an article *ancipitis usus* may be justifiable when its destination is a port having communication by railway with the seat of war, the degree of usefulness of the article for warlike purposes, and the probability of its being used for such purposes being also taken into consideration. Professor Holland's official Admiralty Manual of Naval Prize Laws shows that in 1888 the British government had no intention to extend the right of capture to articles *ancipitis usus* going elsewhere than to a naval port. The Manual contains a long list of contraband articles.

(*m*) See Rutherforth, Ins. lib. i. c. 9. In the commercial treaty between England and the United States, A.D. 1794, an exception was made in favour of unwrought iron and fir planks, all other materials used in ship-building being declared contraband. See also Vattel, liv. iii. c. 7, s. 112.

(*n*) The Neptunus, *supra*.

(*p*) The Jonge Margaretha (1799), 1 C. Rob. 194.

(*q*) Azuni, Diritto Marittimo, c. ii. art. 5, vol. ii. pp. 137, 138.

(*r*) The Twee Juffrowen (1802), 4 C. Rob. 242; The Maria (1799), 1 C. Rob. 340, 372. Pitch, tar and hemp, the produce of neutral states, owned

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Provisions, generally speaking, are not contraband, especially if they are the produce of the country which exports them, unless they are directly sent for the supply of a military force or in relief of besieged or blockaded places (*s*). In the last war with France the National Convention, threatened with famine, by a law of 9th May, 1793, decreed that neutral vessels laden with provisions destined to an enemy's port should be arrested and carried into France; and England by way of reprisals on the 8th of June, 1793, ordered a similar detention of all neutral vessels going to France and laden with corn, meal or flour, and the exercise of a right of pre-emption as to the cargoes unless security was given that they should not be taken to a hostile country. The British Order and a similar Order in 1795 were, however, soon withdrawn (*t*). The law of nations in relation to this subject was declared by Sir W. Scott to be that provisions are not generally contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it (*u*).

Coal being used for a great number of innocent purposes is in its nature an article *ancipitis usus*, and although no English Prize Court has yet been called upon to decide as to its quality, the declarations of British governments show an intention to consider it contraband or not according to circumstances. The supply of coal will, however, be such an

by their subjects and carried in neutral ships, were, however, held to be subject to the right of pre-emption only, instead of confiscation, or were even restored: *ibid.*; The Apollo (1802), 4 C. Rob. 158.

(*s*) 1 Kent, Com. 135, collecting the authorities.

(*t*) See Wheaton's History of the Law of Nations, 373—380.

(*u*) The Jonge Margaretha (1799), 1 C. Rob. 189, 193. See 1 Kent, Com. 137. The Courts of the United States have very generally adopted the principles and followed the decisions of Lord Stowell on questions of prize, contraband, &c. In the Franco-Chinese War of 1885, France asserted the principle that it is lawful to reduce an enemy by famine (a principle put forward by her enemies in 1793, and in theory then maintained by England), and declared rice to be contraband of war. The British Government protested against this attempt to treat provisions indiscriminately as contraband; but the early close of the war left the question unsettled (see Parl. Papers, France, I. 1885).

Sect. 763. important factor in naval warfare, that in the event of a great naval war controversies are sure to arise on the subject (*x*).

Contraband is of an infectious nature.

Contraband articles are said to be of an infectious nature, contaminating whatever of the cargo and of the ship belongs to the same owner, so as to render them liable to seizure and confiscation. In ordinary cases the only loss sustained by the shipowner from having contraband articles on board is the loss of freight and expenses, unless there be fraud on the part of the ship for the purpose of protecting the contraband articles by a false destination or false papers, which will subject the ship also to confiscation (*y*).

Are goods on a voyage to a neutral port ever contraband?

764. It was held by Lord Stowell that the question of contraband cannot arise, except in the case of goods taken in the actual prosecution of a voyage to an enemy's port (*z*); and there is no instance, in the English prize cases, of goods being condemned which were at the time of seizure on their way to a neutral port. The conditions under which our wars were formerly carried on, and the difficulties of land transit, had no doubt made it unnecessary for this country to assert a greater right; but in our time, especially when there is communication by railway between the neutral port and the enemy's country, a limitation of the right of seizure to goods actually on their way to an enemy's port seems quite unreasonable. On principle, the proper rule ought to be that all goods of a contraband kind which are intended for the use of the enemy in the operations of war are liable to seizure,

(*x*) See Hansard, 3rd Ser. vol. 203, p. 1093; Parl. Debates, 4th Ser. vol. 56, p. 656. In Holland's Manual of Prize Law, coal is described as conditional contraband. France declared coal to be contraband in 1870.

(*y*) The Stadt Embden (1798), 1 C. Rob. 26; The Jonge Tobias (1799), *ibid.* 329; The Mercurius (1799), *ibid.* 288; The Franklin (1801), 3 *id.* 217; The Edward (1801), 4 *id.* 68; The Ranger (1805), 6 *id.* 125. These cases establish the rule as stated in the text; of course this rule is liable to modification by treaties. Thus, in the commercial treaties of the United States with the new republics of South America, it was stipulated that contraband articles should not affect the rest of the cargo or the vessel, which should be left free to the owners: 1 Kent, Com. 143.

(*z*) The Imina (1800), 3 C. Rob. 167.

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and this is the rule which has in later years been acted upon by the Courts of other countries (*a*).

In The Peterhoff, the Supreme Court of the United States condemned goods of a contraband kind which were on a voyage during the Civil War to Matamoras, a Mexican town, whence they would have been transported across the river to the Confederate States. On the other hand, in an action on a policy on this identical voyage, the Court of Common Pleas re-affirmed the rule that goods on a voyage to a neutral port are not liable to be condemned as contraband (*b*). During the war in South Africa, however, the British naval forces were instructed to search vessels bound for Delagoa Bay for contraband goods. Several neutral ships were brought into British colonial ports on suspicion of carrying such goods, but none of these seizures led to proceedings in the Prize Court which had been established at the beginning of the war (*c*). It is very improbable, under the circumstances of modern warfare, that a British Prize Court would now exempt

(*a*) By the Supreme Court of the United States in The Commercen (1816), 1 Wheaton, 382; The Springbok (1866), 5 Wallace, 1; The Peterhoff (1866), *ibid.* 28. By the French Prize Court during the Crimean War, in The Vrow Howina, Calvo, Droit International, 4th ed. vol. 5, s. 2767. By the Italian Prize Court in the Abyssinian War, in The Doelwyk: see Ruys *v.* Royal Exchange Ass. Corporation, 2 Com. Cas. 201; [1897] 2 Q. B. 135. The decision in The Springbok led to a correspondence between the British and American governments, but was finally acquiesced in by the former. (See Parliamentary Papers, 1900, Miscellaneous, No. 1.)

(*b*) Hobbs *v.* Henning (1864), 17 C. B. N. S. 791; 34 L. J. C. P. 117. See, however, Seymour *v.* London & Provincial Mar. Ins. Co. (1872), 41 L. J. C. P. 193, in which the Court held that a warranty, "no contraband," was broken in the case of goods going to Matamoras, with an ulterior hostile destination. Lord Stowell's rule was followed in the Manual of Naval Prize Law of 1888, but was repudiated by the British government in 1900, as being inapplicable to the circumstances of the war in South Africa. (See Lord Salisbury's despatch, No. 47, in the correspondence with Germany, Parl. Papers, South Africa, 1900, No. 1.)

(*c*) The only case actually before the Prize Court was The Mashona (see Journal of Comparative Legislation for August, 1900), in which the Court decided (1) that enemy's goods on a British ship were liable to condemnation; (2) that the ship, whose master had instructions to proceed to a British port and take the instructions of the authorities there as to the disposal of the goods, was not liable to be condemned for trading with the enemy.

Sect. 764. goods of a contraband kind, intended for the use of an enemy, from condemnation because they were seized on a voyage to a neutral port.

Insurances on contraband void in the belligerent country.

765. Insurances on articles contraband of war are wholly void in the country of the hostile belligerent, and incapable of being enforced in its Courts (*d*).

Aliter, in the Courts of a neutral state.

If, however, the policies were effected by or for neutrals and sought to be enforced in the Court of a neutral state, the case, as we have seen (*e*), would be different. The contraband articles, indeed, are liable to seizure and confiscation at the hands of the enemy; but the insurance by a neutral of articles contraband of war being *per se* a valid contract, may be enforced in the Courts of the neutral country, provided the nature of the trade and of the goods was disclosed to the underwriter, or provided there be just ground, from the circumstances of the trade or otherwise, to presume that he was duly informed thereof (*f*).

Contraband trade implies a state of war.

The term "contraband of war" implies the existence of war. A policy, therefore, on arms and ammunition exported from Great Britain to Madeira in the dominions of Portugal in time of peace, was held valid, notwithstanding a clause in our treaty of 1810 with that country excepting commerce in articles contraband of war (*g*).

Insurances on voyages in violation of blockade.

Insurance.

766. It is an invariable principle of the law of nations, that if a neutral violates a blockade by carrying supplies to, or in any way trading with, a blockaded port, he thereby renders his ship and cargo liable to confiscation. All insurances, consequently, on voyages or trading adventures commenced or carried out with a fixed purpose of violating, or in actual violation of, the laws of blockade, are incapable of being enforced in the Courts of the state which imposed the

(*d*) 1 Marshall, Ins. 75; see Gibson *v.* Service (1814), 5 Taunt. 433; 1 Marshall, R. 119.

(*e*) *Ante*, s. 760.

(*f*) 3 Kent, Com. 267. There is a possible exception in the case of adventures unlawful under the Foreign Enlistment Act.

(*g*) Wilbraham *v.* Wartnaby (1830), Lloyd & Wels. 144.

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blockade. But, as we have already seen (*h*), neither the voyage nor any contract connected with it is illegal (notwithstanding the distinct object be to run the blockade), except in the Courts of the hostile belligerent. But as an intention to commit a breach of blockade increases the risk, it vitiates the policy, unless this intention was known to the underwriter at the time when the policy was made.

The consequences of a breach of blockade being highly penal, the law of nations has been very careful to determine this point, and has declared that it can only take place under the three following conditions:—

What constitutes a breach of blockade.

First, the port must be in an actual state of effective blockade, and such fact must be clearly established to the satisfaction of the Court.

Secondly, the neutral must have had due previous notice of the existence of such blockade.

Thirdly, he must have been guilty of some distinct act of violation, either by coming into or out of the port with a cargo laden after the commencement of the blockade, or by setting out, after knowledge that the blockade exists, with the intention of violating it.

Entry into port must be dangerous.

767. A port is in a state of blockade when it is invested by a number of vessels sufficiently near the port to make the entry evidently dangerous (*i*). If, however, the attacking force have been dispersed by storm, the commander retaining the purpose of returning immediately to the station, and using due diligence for that purpose, this does not amount to a suspension of the blockade (*k*). But if the blockade be

(*h*) *Ante*, s. 760.

(*i*) The Mercurius (1798), 1 C. Rob. 67; The Betsey (1798), *ibid.* 93; The Stert (1801), 4 C. Rob. 65. See also the definition given in the convention between Great Britain and Russia on 17th June, 1801: 1 Kent, Com. 145. The 4th Article of the Maritime Declaration of the Treaty of Paris of 1856 is in these words: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." The rule that a blockade must be effective was affirmed by the Supreme Court of the United States in The Olinda Rodrigues (1899), 67 Davis (174 U. S.), 510.

(*k*) The Frederick Molke (1798), 1

Sect. 767. raised, either wholly or partially, whether by the coercion of a superior force, or by the deliberate act of the belligerent state, or even by the remissness of its cruisers, the trade of neutrals ought to be free (*l*).

A blockade is properly a uniform and universal exclusion of all vessels; if, therefore, some vessels are permitted to pass, others have a right to infer that the blockade is raised, and as there is no valid blockade, there can be no breach thereof (*m*).

Neutral must have notice of the blockade.

768. In the second place, it is absolutely necessary that the neutral trader shall have notice of the blockade before his ship or goods can be confiscated for violating it. It is immaterial in what way he comes to the knowledge of the blockade; if it actually exists, and he has knowledge of it, he violates it at his peril. Even where he may not have actual knowledge of it, yet, if it have been notified to his government by the blockading power, he will not be permitted to aver ignorance of it; for notice to foreign governments is held to be notice to all their subjects, to whom it is their duty to communicate it (*n*); nay, it was even held in one case by Sir W. Scott that a notification of blockade given to one state must be presumed, after a reasonable time, to have reached the subjects of neighbouring states, and it affects them with the knowledge of the fact (*o*).

The fixed time, however, allowed for the news of blockade to reach neutral countries is not the sole criterion of the right to enter the blockaded port; but it may be submitted as a question of fact to the jury, whether the captain actually had such notice or not (*p*).

C. Rob. 86; The Columbia (1799), *ibid.* 154; The Hoffnung (1805), 6 C. Rob. 112.

(*l*) The Hoffnung (1805), 6 C. Rob. 112, 116.

(*m*) The Rolla (1807), 6 C. Rob. 344.

(*n*) The Neptunus (1799), 2 C. Rob. 110; The Adelaide (1799), *ibid.* 111; see also The Calypso (1799), *ibid.* 298.

(*o*) The Adelaide (1799), 2 C. Rob. 111. The presumption of knowledge of a blockade would no doubt in these days of rapid communication be much greater than it was in Lord Stowell's time.

(*p*) Harratt *v.* Wise (1829), 9 B.

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Effect of notice of cessation of blockade.

The effect of this notice may be purged by subsequent information, given by a fleet of the blockading government, that the blockade has ceased, although such information may be false (*q*). But the information to have this effect must proceed from some one on whom the captain would be justified in relying. Thus, the mistaken permission of an officer of a belligerent cruiser, not forming part of the blockade force, to enter a port of whose blockade the captain had notice, was held not to justify him in so entering (*r*). On the other hand, it will not be a violation of blockade for a captain to enter or clear out of a blockaded port, with a permission to that effect from the commander of the blockading squadron (*s*).

There must be an intention to break the blockade.

769. Thirdly, before the neutral trader can forfeit his neutrality on the ground of a breach of blockade, he must be shown to have had an intention to break the blockade, and also to have done some act towards putting that intention into execution. This may take place in different ways.

The most obvious act of violation is attempting to effect an entrance into a blockaded place in defiance of the investing squadron; but, as the object of blockade is to prevent egress as well as ingress, the attempt to force a way out of a blockaded port is no less a violation of the blockade than an attempt to enter it, and if done knowingly or fraudulently will subject the neutral to a forfeiture of his neutrality and the confiscation of the ship (*t*).

Neutral may quit blockaded port if cargo *bonâ fide* loaded before declaration.

If the cargo, however, has been *bonâ fide* purchased or laden on board before the declaration of the blockade, the neutral will be allowed to come out of port with it, notwithstanding the blockade, without a forfeiture of his neu-

& Cr. 712. See also Winder *v.* Wise (1829), Danson & Lloyd, 238.

(*q*) The Neptunus (1799), 2 C. Rob. 110.

(*r*) The Courier (1810), 1 Edw. 249.

(*s*) The Juffrow Maria Schroeder (1800), 3 C. Rob. 147; The Vrow Barbara (1799), *ibid.* 158, n.

(*t*) The Frederick Molke (1798), 1 C. Rob. 86; The Neptunus (1799), *ibid.* 170; The Vrow Judith (1799), *ibid.* 150.

Sect. 769. trality (*u*): in all cases a vessel that has entered a port before notice of the blockade may come out of it in ballast after such notice (*x*), or may bring away with her the cargo that she had imported before notice of the blockade, and which still remains on board of her. But a ship purchased at the blockaded port after the declaration of blockade cannot be cleared out from the port while the blockade continues (*y*).

Overland transit of goods to or from a blockaded port no breach.

It is not a violation of blockade in a neutral to purchase goods at the blockaded port and transport them thence overland to another port not blockaded, and then export them from the latter port (*z*); by parity of reasoning, it is not a breach of this warranty to transport goods by inland navigation from or to the blockaded port (*a*).

Sailing with notice of blockade generally a breach.

770. To constitute a breach of blockade, it is not in every case necessary that there should be a positive act of entry within the limits of the blockade. Where the captain before sailing has either impliedly or actually had notification of the existence of the blockade, the very act of sailing for the blockaded place with the intention of entering it if found practicable or expedient will (except in the case of very long voyages (*b*)) amount, from the very commencement of the voyage, to a breach of the blockade, and subject the neutral from that time to all the penalties of its violation (*c*).

So, although the neutral may have had no notice of the blockade at the time of first sailing, yet, if he be informed of the fact at any port at which he may afterwards touch, and

(*u*) The Betsey (1798), 1 C. Rob. 93; The Comet (1808), 1 Edw. 32. The general practice of belligerents is, in notifying a blockade, to allow a certain number of days for neutral ships to complete their loading and leave the port.

(*x*) The Frederick Molke (1798), 1 C. Rob. 86.

(*y*) The General Hamilton (1805), 6 C. Rob. 61; The Vigilantia (1805), *ibid.* 122.

(*z*) The Ocean (1801), 3 C. Rob. 297.

(*a*) The Stert (1801), 4 C. Rob. 65; The Yonge Pieter (1801), *ibid.* 79. See also The Peterhoff (1866), 5 Wallace, 28.

(*b*) Naylor *v.* Taylor (1829), 9 B. & Cr. 718.

(*c*) The Columbia (1799), 1 C. Rob. 154; The Neptunus (1799), 2 C. Rob. 110.

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still attempt to enter the blockaded port, this is a ground of condemnation (*d*).

Lingering near a blockaded port is a breach of blockade.

Lingering near a blockaded port, as well as continuing in the course towards it after notification, when it shows an intention to enter the port, is a breach of the blockade (*e*).

So sailing with instructions to make inquiries at blockaded port, except in case of distant voyages.

So, sailing after notification of a blockade, with instructions to proceed to the mouth of the harbour of a blockaded place to inquire if the blockade was raised, is a ground for confiscation (*f*).

Even an agreement by charter-party to proceed to a port which is afterwards blockaded does not justify the captain's proceeding on the voyage after notification of the blockade (*g*).

The mere act, however, of sailing for a blockaded port, after notice of the blockade, is not a forfeiture of neutrality, unless there was a premeditated design of breaking the blockade, supposing it should be found to continue in force on the ship's arriving at the port. In the case of distant voyages, such as those across the Atlantic, vessels were allowed to sail, after notice of a blockade, on a contingent destination for the blockaded port, subject to the duty of subsequent inquiry, at suitable places, as to the continuance of the blockade (*h*).

If it be attempted to prove by the sentence of a foreign Court of Admiralty that the ship was condemned for a breach of blockade, this can only be done by showing that the sentence on the face of it explicitly proceeded on that ground (*i*).

Insurance on neutral ships engaged in

771. It is contrary to the principles of the English Prize Law, that a neutral should be allowed to carry on the coasting

(*d*) The Columbia (1799), 1 C. Rob. 154; Winder *v.* Wise (1829), Dan. & Ll. 23. See the *S. P.* variously decided in the Courts of the United States, 1 Phillips, Ins. s. 840.

(*e*) The Elizabeth (1810), 1 Edw. 198; The Arthur (1810), *ibid.* 202.

(*f*) The Irene (1804), 5 C. Rob. 76.

(*g*) The Tutela (1805), 6 C. Rob. 177.

(*h*) The Shepherdess (1804), 5 C. Rob. 264; Naylor *v.* Taylor (1829), 9 B. & Cr. 718; Dalgleish *v.* Hodgson (1831), 7 Bing. 495; Medeiros *v.* Hill (1832), 8 Bing. 231.

(*i*) Dalgleish *v.* Hodgson (1831), 7 Bing. 495; 5 M. & P. 407.

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the coasting or colonial trade of the enemy.

or colonial trade of the enemy, not open to foreigners during peace, and thereby increase the enemy's resources during war.

Accordingly, the rule established by England is, that ships and cargo engaged in such trade shall be liable to confiscation as prize of war. This, which is frequently called the rule of 1756, from its having been first settled in that year, was frequently acted upon by Lord Stowell in the course of the wars arising out of the French Revolution (*k*).

There can be no doubt that an insurance, effected in this country, England being at the time a belligerent power, to protect such privileged neutral trading, would be treated as wholly illegal and void by our Courts, on the ground that "trading to an enemy's colony with all the privileges of an enemy's ship causes a neutral vessel to be regarded as an enemy's ship, and renders her lawful prize." (*l*).

The coasting trade of this country was thrown open to foreign ships by the 17 & 18 Vict. c. 5.

Enemy's goods on board neutral ships.

772. Until the Declaration made with the Treaty of Paris in 1856, it had come to be considered as an established rule of the law of nations, though none has been at times more vehemently contested by those states whose interests for the time being it opposed, that the neutral flag does not in time of war protect enemy's property from hostile seizure (*m*).

The carrying, however, of enemy's goods from the neutral territory to the enemy's country was not held to be a breach

(*k*) See The Immanuel (1799), 2 C. Rob. 186.

(*l*) Berens *v.* Rucker (1761), 1 W. Bl. 314.

(*m*) Grotius, De Jure Belli ac Pacis, lib. iii. c. 6, s. 6; Vattel, Droit des Gens, liv. iii. c. 7, s. 115. One of the most celebrated articles of the code of the armed neutrality of 1780 was, that "all effects belonging to the subjects should be looked upon as free on board neutral ships, except only such as were contraband." Azuni, who gives an interesting narrative of the practice of Europe in this respect, discusses, on abstract principles, the question "whether free ships should make free goods;" and, though one of the strongest champions of neutral rights, he decides, on principle, that the former rule of the English Admiralty is the sound one (Diritto Marittimo dell' Europa, c. iii. art. 2, vol. ii. p. 172, s. 152). See also the whole subject most ably discussed in Manning's Commentaries on the Law of Nations, 203—244.

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of neutral conduct, and if there were nothing unfair in the transaction, the neutral carrier was held entitled at the hands of the captors to the full freight due for the carriage of the goods upon the whole voyage, though he had not carried them to their place of destination, because a surrender of them to the captors is a delivery to the person who, by the rights of war, is put in the place of the consignee (*n*).

Insurance on goods of belligerent on neutral ship.

No insurance on such goods themselves could, of course, be enforced in the Courts of the hostile belligerent, and would by them be considered absolutely illegal and void if made by any of his subjects. If made, however, by neutrals, and sought to be enforced in neutral Courts, it would be otherwise; for as the neutral may lawfully carry enemy's property, there can be no doubt that he may lawfully insure it (*o*).

Insurances on neutral goods going to enemy's port.

An insurance may be lawfully effected in the belligerent country on the property of neutral owners, on board a ship which is also conveying enemy's goods to an enemy's port. The fact of carrying enemy's goods may (unless the belligerent is bound by the rule of the Declaration of Paris) subject the neutral ship to be detained and carried into port for investigation; yet it does not render the adventure illegal so as to affect the interest of neutral owners if not covered by the same policy as that by which the enemy's goods are insured.

Barker *v.* Blakes.

Hence, where an American ship from New York to Havre was carried into Bristol by British cruisers for examination, and found to have a small portion of enemy's property on board, it was held that British underwriters were nevertheless answerable to neutral owners of neutral goods insured on board the same ship, but not by the same policy, in respect of loss incurred on such goods by the breaking up of the

(*n*) The Copenhagen (1799), 1 C. Rob. 289. See also Maclachlan, Merchant Shipping, 4th ed. 519.

(*o*) 3 Kent, Com. 267.

Sect. 772. voyage consequent on the ship's being so brought in for examination (*p*).

Neutral property on enemy's ships.

773. It is a clear rule of the law of nations that the effects of neutrals found on board enemy's ships shall be free, and both cases rest on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend (*q*).

The captor, in case of neutral goods found on board an enemy's vessel, is entitled to freight upon them if he performs the voyage and carries the goods to their port of original destination, but not otherwise (*r*).

The immunity of neutral goods, however, on board an enemy's ship is confined to the case of a merchantman, and does not extend to an armed cruiser; for by placing them on board an armed ship of the enemy the neutral shows an intention to resist visitation and search, and to that extent an adherence to the enemy (*s*).

Declaration of Paris.

774. The 2nd and 3rd Articles of the Maritime Declaration of 1856 are as follows:—

2. The neutral flag covers enemy's goods, with the exception of contraband of war (*t*).

3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

No states are bound by this declaration except those who were parties to it at the time, or who have adopted it subsequently. The states originally parties to it are England, France, Austria, Russia, Prussia, Sardinia and Turkey. Most

(*p*) Barker *v.* Blakes (1808), 9 East, 283.

(*q*) Grotius, De Jure Belli ac Pacis, lib. iii. c. 6, s. 16; Vattel, liv. iii. c. 7, s. 116.

(*r*) The Fortuna (1802), 4 C. Rob. 278; The Diana (1803), 5 C. Rob. 67.

(*s*) The Fanny, 1 Dodson, Adm. R. 443.

(*t*) There is no exemption of enemy's goods carried in a ship of the captor's country. Thus, in time of war between Great Britain and the Transvaal goods in the course of carriage in a British ship to Lorenzo Marques, for consignees in the Transvaal, were recently condemned by the Prize Court sitting in Cape Colony: The Maahona, the judgments in which case are printed in the Journal of Comparative Legislation for August, 1900.

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of the other maritime nations have acceded to it. In the recent war between the United States and Spain both belligerents, though they had not acceded to the Declaration, agreed to the exemption of enemy's goods in neutral ships from capture, and a return to the older rule seems improbable.

The 2nd Article of the Declaration of Paris does not, it is submitted, affect the operation of the rule, founded on public policy, that insurances on the property of a belligerent are considered invalid in the Courts of the other belligerent.

PART III.

OF LOSSES, AND THE RELATIONS OF THE ASSURED AND UNDERWRITER THENCE ARISING.

CHAPTER I.

LOSSES NOT COVERED BY THE POLICY.

	SECT.
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BEFORE proceeding to consider that clause in the policy which enumerates the specific perils against which the underwriters engage to indemnify the assured, we will direct our attention to certain general principles which, in all cases alike, limit and modify the underwriter's responsibility.

Loss by wear and tear.

775. An important limitation on the underwriter's liability is, that he undertakes to indemnify the assured only against loss caused by the direct and violent operation of the perils insured against, and not against the ordinary wear and tear of the voyage.

No ship can navigate the ocean for any length of time, even under the most favourable circumstances, without suffering a certain degree of decay and diminution in value, which we speak of as wear and tear; for this, however considerable, the underwriter is never liable: he is only liable

Sect. 775. when the damage sustained is the result of some casualty, or "something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen" (*a*).

Distinction between wear and tear and average loss.

Such is the undoubted rule; but its application is often a matter of great nicety. In fact, few things in the law of Marine Insurance have been found more difficult in practice than to discriminate between damage occasioned by the ordinary service of the voyage and that caused by the perils of the sea.

Phillips (*b*) observes that it is most difficult to distinguish what is wear and tear and decay, from the damage which constitutes a loss, in the case of sails, rigging, cables and anchors. Where sails are purposely cut away, or a cable is purposely cut for the purpose of escaping from an impending peril, the voluntary sacrifice clearly gives a claim against the insurers, though the thing sacrificed is old and would soon have been worn out and destroyed by use. "But where the damage or loss is not voluntary, it is difficult in many instances to determine whether it ought to fall upon the owner of the vessel or the underwriter. The parting of a rope or cable, or the splitting of a sail, is not in itself necessarily a proof of the extraordinary operation of the perils of the seas, for this will happen from use and decay in the most favourable weather and under the most fortunate circumstances. Damage or loss of this sort, therefore, commonly belongs to the owner of the vessel to bear, and does not constitute the ground of any claim against the insurer, unless it takes place out of the common course of things, or appears to be the effect of the unusual and violent operation of a peril insured against."

(*a*) Per Lord Herschell in The Xantho (1887), 12 App. Cas. at p. 509. See also per Lush, J., in Merchants' Trading Co. *v.* Universal Marine Co. (1870), 2 Asp. M. L. C. N. S. 431, cited L. R. 9 Q. B. at p. 596. His definition, however, is open to the criticisms of Lowndes (Mar. Ins. s. 187) and Gow, p. 95.

(*b*) Sect. 1105.

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776. Thus, if a cable be chafed by the rocks, or the fluke of an anchor broken off, in a place of usual anchorage and under no extraordinary circumstances of wind and weather, this is ordinary wear and tear of the voyage which falls on the owner alone, and for which the underwriter is not liable; if, on the other hand, the same thing were to occur in a place of unusual anchorage, or even in the usual anchorage ground in a gale of extraordinary violence, the underwriter would be liable for the loss as caused by the perils of the sea (*c*).

In case of cables and anchors.

Where a mast is sprung or spars snapped by the direct action of the wind, the fact itself proves the violence to have been extraordinary, and the loss falls on the underwriter as caused by a peril of the sea (*d*); the result is the same if the ship in a heavy cross rolling sea pitch or lurch away her masts (*e*).

In case of masts, spars and sails.

So, if sails are blown from the bolt-ropes, or split, by a squall coming on so suddenly that they could not be furled, this is a loss by the perils of the sea, and not by the ordinary wear and tear of the voyage (*f*), and the decision of our English Courts has been to the same effect when sails are split or masts carried away in consequence of crowding a press of sail to avoid an enemy or a lee shore (*g*).

On the other hand, if masts or spars are damaged, or sails

(*c*) Benecke, Pr. of Indem. 456; Stevens on Average, 160; Phillips, Ins. s. 1105. Lowndes (Mar. Ins. s. 287) points out that, as articles of this kind are provided for the very purpose of resisting, and are necessarily subjected to, much constant ordinary strain, the former rule of practice was to treat a breakage as mere wear and tear, apart from exceptional cases. Latterly, however, there has been a tendency to relax this rule, owing to the compulsory tests imposed by the Board of Trade; the argument being, that a fracture sustained by an article which has passed the test must be *primâ facie* due to extraordinary circumstances. Cf. also Gow, 209, 210.

(*d*) See Phillips, s. 1105.

(*e*) Stevens, 166.

(*f*) Benecke, Pr. of Indem. 454.

(*g*) Covington *v.* Roberts (1806), 2 B. & P. N. R. 378; Stevens on Average, 168. Even here, Benecke thinks that, except under extraordinary circumstances, this loss would not fall on the underwriters, "because the dangers in which these losses originate are occurrences which frequently take place, and which the vessel ought to be able to resist:" p. 455, *sed quære*.

Sect. 776. torn, worn out, or carried away, in the ordinary service of the ship, and not by the direct and violent operation of any extraordinary casualty; in other words, by any of the perils of the seas, in the sense which these words bear in policies of insurance, this is undoubtedly only wear and tear, and does not fall upon the underwriter (*h*).

Technical wear and tear.

777. In view of the practical difficulty in determining whether the loss of a sail is, under particular circumstances, due to wear and tear rather than to extraordinary weather, and in order to avoid disputes as to the exact condition of a lost sail and the precise degree of a gale, a distinction has been established at Lloyd's, and has been included in the Rules of Practice of the Association of Average Adjusters, between literal and technical wear and tear. According to this usage, technical wear and tear—*i.e.*, "sails split by the wind or blown away while set, unless occasioned by the ship's grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent—are not charged to underwriters." And similarly, "rigging injured by straining or chafing is not charged to underwriters, unless such injury is caused by blows of the sea, grounding or contact, or by displacement through sea peril of the spars, channels, bulwarks, or rails" (*i*).

Damage caused by springing a leak, when wear and tear, and when average.

The damage caused by springing a leak is not a charge upon the underwriters, unless it be directly traceable to the immediate and violent operation of some peril insured against, as where the leak can be proved to have been caused by a heavy sea striking the vessel or by her being driven on a rock, &c.; where the leak arises from the unseaworthy state of the ship when she sailed, or from wear and tear or natural decay (*k*), and is only a consequence of that ordinary amount

(*h*) Benecke, Pr. of Indem. 451; Phillips, Ins. s. 1105.

(*i*) See McArthur, 110—113, 220—222, who notices other general rules relating to injuries to pumps, donkey-engines and other parts of a vessel's machinery, which are followed in practice.

(*k*) See per Lord Halsbury in Hamilton *v.* Pandorf (1887), 12 App. Cas. at p. 523.

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of straining to which she would unavoidably be exposed in the general and average course of the voyage insured, the underwriter is not liable (*l*).

Damage done to the hull of the ship, as by enemy's shot, by worms, rats, &c.

Damage done to the hull of the ship in the course of defending her against an enemy is not ordinary wear and tear of the voyage, at all events as regards a merchantman (*m*); nor is damage done by storm to the ship's upper works (*n*). But damage done to the hull of the ship by worms and rats is, generally speaking, regarded as falling within the ordinary wear and tear of the voyage and not on the underwriters (*o*).

Damage to copper sheathing.

With regard to copper sheathing, the right rule would seem to be that the underwriter ought to be responsible for all damage violently done to it by the direct operation of the perils of the sea, as where it is torn or scraped off by rocks in consequence of a storm; but not for any deterioration which, considering the age of the sheathing and the incidents of the voyage, can fairly be attributed to wear and tear (*p*).

These are a few instances of the application of this rule; but, after all, much must be left to the judgment of practical men in each case, subject to this guiding principle: that whenever the loss can, upon a fair review of all the circumstances,

(*l*) Fawcus *v.* Sarsfield (1856), 6 E. & B. 199; Dudgeon *v.* Pembroke (1877), L. R. 9 Q. B. 581; and The Merchants' Trading Co. *v.* Universal Marine Ins. Co., (1870), 2 Asp. M. C. N. S. 431, there cited by Blackburn, J.

(*m*) Taylor *v.* Curtis (1816), 6 Taunt. 608; 2 Marshall, R. 309; Stevens on Average, 167, 168, *contra*. But see Benecke, Pr. of Indem. 456.

(*n*) Stevens on Average, 161; Benecke, Pr. of Indem. 454; 1 Phillips, Ins. s. 1105.

(*o*) As to worms, see Rohl *v.* Parr (1794), 1 Esp. 445; 1 Phillips, Ins. s. 1101; 3 Kent, Com. 300, n. As to rats, Hunter *v.* Potts (1815), 4 Camp. 203; Laveroni *v.* Drury (1852), 8 Exch. 166. *Secus*, however, where the rats gnaw a hole which lets in sea-water, Hamilton *v.* Pandorf (1887), 12 App. Cas. 518.

(*p*) Phillips, s. 1505. It was for some time the practice of underwriters not to pay for damage done to the hull below the water-line, except where the ship had taken the ground or had come into contact with some substance other than water. But in Harrison *v.* The Universal Marine Ins. Co. (1862), 3 F. & F. 191, a special jury at the Guildhall found that the custom was not established. This led to the insertion of "The Metalling Clause." See McArthur, 308.

Sect. 777. be imputed to the ordinary wear and tear of the voyage, the underwriter is exempt from liability.

Underwriter is not liable for loss arising from the proper vice of the thing insured.

778. Upon the same ground, the underwriter is not liable for that loss or deterioration which arises solely from a principle of decay or corruption inherent in the subject insured, or, as the phrase is, from its proper vice; as when fruit becomes rotten, or flour heats, or wine turns sour, not from external damage, but entirely from internal decomposition (*q*). Accordingly, where meat shipped at Hamburg became putrid through delay on the voyage occasioned by tempestuous weather, and was necessarily thrown into the sea, it was held to be no loss within the meaning of the policy (*r*). So, if spontaneous combustion is generated by the effervescence or other chemical change of the thing insured, arising from its having been put on board wet or otherwise damaged, the underwriter is not liable (*s*); but it lies upon him to show clearly that the fire really arose from this cause (*t*).

Loss by spontaneous combustion.

The same rule applies to a case of loss of, or damage to, ship. Thus, where a vessel insured under a time policy sailed in an unseaworthy state, and, without encountering any more than ordinary marine risk, was obliged, owing to the defective state in which she sailed, to put into a port for repair, the expenses of doing so were held to be irrecoverable, although there was no warranty of seaworthiness and although the owner was not aware of her defects (*u*).

Loss by ordinary leakage and breakage not covered by the policy.

779. Upon the same principle, the underwriter is never liable for that ordinary and inevitable amount of leakage and breakage to which wines, spirits, molasses, oil, earthenware,

(*q*) See the authorities collected 1 Emerigon, c. xii. s. ix. pp. 388—392.

(*r*) Taylor *v.* Dunbar (1869), L. R. 4 C. P. 206; approved in Pink *v.* Fleming (1890), 25 Q. B. D. 396.

(*s*) 1 Emerigon, c. xii. s. xviii. § 4, p. 430.

(*t*) Boyd *v.* Dubois (1811), 3 Camp. 132; Providence Washington Ins. Co. *v.* Adler (1885), 65 Maryland, 162.

(*u*) Fawcus *v.* Sarsfield (1856), 6 E. & B. 192. Cf. Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455; and contrast Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284.

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glass, and other liquid, or brittle, commodities are necessarily exposed in the usual course of even the most fortunate voyage.

This is a rule universally established by the general law maritime, wherever the practice of marine insurance is known (*x*). Stevens states that, by the custom of Lloyd's, articles liable to leakage and breakage, though not enumerated in the common memorandum, are always understood to be "free of average" (*i.e.*, the underwriter, as to them, is liable for no partial loss, however great its amount may be), unless it can be shown that the ship in the course of the voyage has struck the ground with such force as thereby to have damaged her stowage (*y*). Lord Denman, however, considering this to be an unreasonable usage, would not allow it to be given in evidence to defeat the claim of the assured. The facts of the case were shortly these:—Thirty-six casks of oil insured from London to St. Petersburg were safely stowed at the beginning of the voyage, but in the course of it, in consequence of the pitching and labouring of the ship in cross seas, they leaked to such an extent that ten of the casks were completely emptied, and the rest had lost a great part of their contents. The casks, however, had not shifted their places —in other words, "the stowage was not damaged." The defendants proposed to give in evidence the custom of Lloyd's; but Lord Denman rejected the evidence, and told the jury to consider whether the loss was in fact caused by what they considered perils of the seas; the jury being unable to agree, a verdict was taken by consent for the defendant (*z*).

But extraordinary leakage or breakage caused by the violent pitching and labouring of the ship at sea is covered.

In our own country no fixed rule is laid down as to what shall be considered ordinary leakage and breakage on given articles on a given voyage.

In the United States, and generally on the continent of Europe, a certain percentage is fixed, varying upon different

(*x*) For the general principle, see 1 Emerigon, c. xii. s. ix. p. 389, who collects the authorities. See also Code de Commerce, art. 355; Stevens on Average, 219.

(*y*) Stevens, 219.

(*z*) Crofts *v.* Marshall (1836), 7 C. & P. 597, tried at Guildhall before a special jury.

Sect. 779. articles, and upon voyages of different length and duration, as the ordinary amount of leakage and breakage, for which the underwriter can in no case be liable, even though the ship may be wrecked or stranded. Any leakage or breakage beyond this average amount is a loss to the underwriter if the ship be wrecked or stranded, but not otherwise.

Commixture no loss.

780. There may be a bursting of the wrappers, and a commixture of the contents, without any loss on that account such as the insurer would be liable for. Where cotton wool belonging to different owners was shipped in bales by the same vessel, and encountered such a tempest on the voyage that many of the bales were burst and the contents mingled, and the distinctive marks upon others of the bales were obliterated, it was held that the several owners became tenants in common of the mass, and were not deprived of their property in the whole, so as to entitle them to claim as for a total loss (*a*).

Mortality among animals.

781. Upon the same principle, under policies on living animals the underwriters are not liable for losses solely attributable to death from natural causes. As, for instance, if it be owing to any infectious disorder which might equally have seized them on land, or to some disease which, though probably in part occasioned by the confinement and other usual circumstances of the voyage, is yet not proximately caused by any extraordinary, violent, or immediate agency of the perils insured against, the underwriters are undoubtedly not liable for the loss.

Mortality of negro slaves. Death caused by suicide held not to be at the risk of the underwriter.

As long as negro slaves were universally regarded by the jurists of civilised and Christian Europe as mere live stock, it was gravely determined that self-inflicted death, produced by the horror and despair of a fellow-man, was a loss arising from the proper vice and inherent pravity of the thing insured, and as such was not to be at the charge of the underwriters (*b*).

(*a*) Spence *v.* Union Marine Ins. Co. (1868), L. R. 3 C. P. 427.

(*b*) Valin, Ordon. tit. vi. arts. 11, 15; Pothier, d'Assurance, No. 66; and see M. Estrangin, *ibid.*

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Loss caused by throwing overboard negro slaves.

The Courts were even driven to the disgrace of listening to solemn arguments to prove the position (which they only evaded establishing as law by resorting to a technical point of pleading) that the loss occasioned by throwing overboard part of the human cargo of an overloaded slaver, in order to avoid a scarcity of water, was a loss for which the underwriters were liable as an ordinary peril of the sea (*c*).

Nay, Lord Mansfield himself had to undergo the melancholy degradation of applying all the subtlety of his great intellect, in order to assist a special jury of London merchants in coming to the following conclusions in a case where "mortality by mutiny of slaves" was included amongst the perils insured against:—1. That all the slaves who were killed in the mutiny, or died of their wounds, were to be paid for. 2. That all those who died of their bruises which they had received in the mutiny, though accompanied by other causes, were to be paid for. 3. That all who had swallowed salt water or leaped into the sea, and hung upon the sides of the ship without being otherwise bruised, or died of chagrin, were not to be paid for (*d*).

Death of slaves from scarcity of food and water on the passage.

In the last case upon this subject in our books, it was decided that where negro slaves died on the passage from scarcity of food caused by the extraordinary and unavoidable delay of the voyage, this was a case of natural death, for which the underwriters were not liable (*e*).

Happily, since the extinction of the African slave-trade in this country, and the numerous international treaties between our own and foreign governments for the suppression of the traffic, English underwriters can no longer have any immediate concern with insurances upon slaves. Several of the principles, however, established by these decisions are still applicable to insurances on live stock.

(*c*) Gregson *v.* Gilbert (1783), 1 Park, 138; Marshall, Ins. 560.

(*d*) Jones *v.* Schmoll, cited 1 T. R. 130. The above is taken *verbatim* from the report.

(*e*) Tatham *v.* Hodgson (1796), Park, 141; 6 T. R. 656.

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Cases of insurance on live stock, warranted free of mortality.

782. Thus, in a case where thirty mules, ten asses, and thirty oxen were insured "at and from Cork to Barbadoes and St. Vincent, warranted free of mortality and jettison," Lord Tenterden held, upon the authority of the case of Tatham *v.* Hodgson, just cited, that if the ship had been driven out of her course by perils of the sea, and the voyage thereby had become so protracted as to exhaust all the provisions, and consequently the means of sustaining the life of the animals insured, then the words, "warranted free of mortality," introduced into the policy, would have protected the underwriters from liability for loss arising from such cause (*f*).

Where the perils of the sea have been a conducing cause of the loss, it is often a matter of great difficulty to settle the question of the underwriter's liability.

In the case just cited, where the underwriters expressly stipulated not to be liable for any loss caused by "mortality," it appeared that all the animals insured, except five mules and one ass, died on the voyage of severe bruises, lacerations, and injuries, arising from the violent pitching and rolling of the ship occasioned by a furious storm and the consequent agitation of the sea; Lord Tenterden and the rest of the Judges of the King's Bench decided that this was a loss by the perils of the sea, for which the underwriters were liable, and further, though only with some doubt, that they were not protected by the warranty to be "free of mortality," for the word mortality, in its ordinary sense, never means violent death, but death arising from natural causes (*g*).

And in a subsequent case of the same kind, where horses were insured from Liverpool to Jamaica with the same warranty to be "free of mortality and jettison," the horses, which had been in the first instance properly secured between decks, came, by the labouring of the vessel in a violent storm, first to break the slings by which they were supported, and

(*f*) Per Lord Tenterden in Lawrence *v.* Aberdein (1821), 5 B. & Ald. 111; and cf. Taylor *v.* Dunbar (1869), L. R. 4 C. P. 206.

(*g*) Lawrence *v.* Aberdein (1821), 5 B. & Ald. 107.

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then, having kicked down the partitions by which they were separated, and being unable to stand owing to the great rolling of the vessel, to kick and bruise each other so violently that thereby, and by the injuries received from the pitching of the vessel, they all died in the course of the storm. The Court felt bound by their former decision to hold, that the underwriters were liable as for a loss by the perils of the sea (*h*).

Risk of loss not proximately caused by the perils insured against: *Causa proxima non remota spectatur.* The underwriter is liable for no loss which is not proximately caused by the perils insured against; but he is liable for all loss that is so caused.

783. The underwriter is liable for no loss which is not proximately caused by the perils insured against. *Causa proxima non remota spectatur* is a principle which is more rigorously applied to cases of marine insurance than to those of other liabilities. According to the law of marine insurance, where there is a succession of causes which must have existed in order to produce the result, the last cause only must be looked to and the others rejected, although the result would not have been produced without them (*i*).

Consequences, in Insurance Law.

On similar reasoning, the word "consequences" in a marine policy has been determined to mean a constant effect of the same cause. Thus, a policy was effected, after the American civil war had begun, on 6,500 bags of coffee, English property, with English insurers, by a Federal ship from Rio Janeiro to New York, "warranted free from particular average unless the ship should be stranded, sunk, or burnt; warranted also free from capture, seizure and detention, and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots or commotions." An important light, for years established on Cape Hatteras, was extinguished by the Confederates with hostile intentions against Federal shipping. The ship in

(*h*) Gabay *v.* Lloyd (1825), 3 B. & Cr. 793. All the Court held that this case fell within that of Lawrence *v.* Aberdein, with which decision Abbott, C. J. (Lord Tenterden), Bayley, J., and Holroyd, J., expressed themselves perfectly satisfied, but Littledale, J., said he doubted whether he should have concurred with it.

(*i*) See Pink *v.* Fleming (1890), 25 Q. B. D. 396, per Lord Esher, M. R. Cf. Reischer *v.* Borwick, [1894] 2 Q. B. 548.

Sect. 783. question, having lost her reckoning between New Orleans and this Cape, looked in vain to descry the light, although, had it been burning, it was admitted she could have seen it and recovered her course, avoiding the danger. As it was, she went ashore in a heavy sea a few miles south-west of the lighthouse, and the greater part of the cargo was lost. It was held that the consequences intended in the warranty were such only as constantly follow the operation of the same cause; and as loss could not be predicated as the constant effect of the light being out in respect of every ship bound on the voyage insured, the case was held not to be within the warranty, and the plaintiff recovered as for a loss by perils of the sea (*k*).

Twofold operation of the rule.

784. The maxim as to *causa proxima* as applied in practice has a twofold operation—partly to limit and partly to enlarge the underwriter's responsibility. It acts in the latter mode in all those cases where it has been decided that the underwriter shall be liable for all losses that are proximately caused by the perils insured against, though they may be remotely occasioned by the acts or negligence of the assured or his agents (*l*).

Illustrations of the rule.

We shall have occasion elsewhere to discuss the two classes of cases just referred to; it will be sufficient here to mention a few illustrations of the rule, in as far as it tends to limit the underwriter's responsibility (*m*).

Thus, loss from sale of goods, to defray expenses of repairs in a port of distress, is not within the policy on goods (*n*);

(*k*) Ionides *v.* The Universal Marine Ins. Assoc. (1863), 14 C. B. N. S. 259; 32 L. J. C. P. 170. Cf. Nickels *v.* London, &c. Ins. Co. (1900), 6 Com. Cas. 15.

(*l*) Busk *v.* Royal Exch. Ass. Co. (1818), 2 B. & Ald. 72, and the line of cases between that and Redman *v.* Wilson (1845), 14 M. & W. 476; Green *v.* Elmslie (1792), Peake, N. P. 212; Heyman *v.* Parish (1809), 2 Camp. 149; Arcangelo *v.* Thompson (1811), *ibid.* 620; Livie *v.* Janson (1810), 12 East, 648; Hahn *v.* Corbett (1824), 2 Bing. 205; Montoya *v.* London Ass. Co. (1851), 6 Ex. 451; 20 L. J. Ex. 254.

(*m*) A number of instances collected from the American reports will be found in Campbell's Ruling Cases, vol. xiv. pp. 293—296.

(*n*) Powell *v.* Gudgeon (1816), 5 M. & S. 431; Sarquy *v.* Hobson (1823), 4 Bing. 131.

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nor is a loss by bottomry on cargo for the purposes of the ship (*o*); nor is loss by fall of the market during the delay in estimating average damage, or loss at public auction occasioned by suspicion of damage (*p*); nor is loss of freight occasioned by a prudent sale by the master of cargo on which freight could ultimately have been earned, within the policy on freight (*q*). So, loss of voyage caused by interdiction of commerce, blockade, or hostile possession of the port of destination, is not a risk within the policy, being the effect of a peril acting not immediately, but circuitously, on the thing insured (*r*).

So, the wages and provisions of the crew during a delay for repairs, or detention by an embargo, are not a risk within the policy; though this is so, rather because these form part of the ordinary expenses of the voyage (*s*); and, perhaps even more clearly, because it is the ship that is the subject-matter of insurance, and it is damage to the ship, against which the underwriter on ship promises to indemnify the owner; and this does not necessarily include all damages sustained by the shipowner (*t*).

The following case is a good illustration of the application of the rule:—

A vessel loaded with hides and tobacco shipped a quantity of sea water, which rotted the hides but did not come directly into contact with the tobacco or the packages in which it was contained; the tobacco, however, was spoiled by the reek of

(*o*) Greer *v.* Poole (1880), 5 Q. B. D. 272.

(*p*) Cator *v.* Great Western Ins. Co. of New York (1873), L. R. 8 C. P. 552.

(*q*) Mordy *v.* Jones (1825), 4 B. & Cr. 394; Philpot *v.* Swann (1861), 11 C. B. N. S. 270.

(*r*) Hadkinson *v.* Robinson (1803), 3 B. & P. 388; Lubbock *v.* Rowcroft (1803), 5 Esp. 67; Nickels *v.* London & Prov. Ins. Co. (1900), 6 Com. Cas. 15.

(*s*) Fletcher *v.* Poole (1769), Park, Ins. 115; Eden *v.* Poole (1785), *ibid.* 117; Robertson *v.* Ewer (1786), 1 T. R. 127. Lord Denman, however, puts these cases on the ground of *causa proxima non remota spectatur*. De Vaux *v.* Salvador (1836), 4 A. & E. 428.

(*t*) This was one, at least, of the grounds of the decision in Robertson *v.* Ewer (1786), 1 T. R. 127: see per Buller, J.; and see Field S.S. Co. *v.* Burr, [1898] 1 Q. B. 821; C. A., [1899] 1 Q. B. 579, and cases there referred to.

Sect. 784. the putrid hides. It was held, that in this case the perils of the sea were the proximate cause of the loss on the tobacco as well as on the hides (*u*).

Stringent application of the rule as to proximate cause in cases where an act of volition or election has intervened between the peril insured against and the loss.

785. The stringency, however, with which the rule is applied is well illustrated by several decisions, both old and recent, in connection with policies on freight. In the result, it is established that where freight is lost to the shipowner in consequence, indeed, of perils of the sea, but between the peril and the loss there intervenes some act of volition or election on the part either of the shipowner or charterer to which the loss is more proximately due—in such cases the loss is attributed not to the peril of the sea, but to such act of volition or election. And this is so, even in a case where such act has amounted to nothing more than a prudent and necessary choice between the lesser of two evils.

Loss of freight owing to abandonment of ship after constructive total loss.

Thus in M'Carthy *v.* Abel (*x*), a shipowner, owing to perils insured against, properly abandoned ship and freight to the respective underwriters thereon, but the vessel was subsequently able to complete her voyage and earned freight, which the underwriters on ship and not the shipowner received. The latter then unsuccessfully attempted to recover the freight he had lost from his underwriters on freight; Lord Ellenborough pointing out that the loss was due not to perils insured against, but to the abandonment of the ship, "which abandonment was the act of the assured themselves, with which therefore, and the consequences thereof, the underwriters have no concern." And this view was subsequently confirmed in the House of Lords (*y*).

Loss of freight owing to exercise by charterers of special rights

The principle received further confirmation in the case of the Inman Steamship Company, Limited, *v.* Bischoff. The "City of Paris" was chartered by her owners to the Board

(*u*) Montoya *v.* London Ass. Co. (1851), 6 Exch. 451; 20 L. J. Exch. 254.

(*x*) (1804), 5 East, 388.

(*y*) In Scottish Mar. Ins. Co. *v.* Turner (1853), 1 Macq. H. L. Cas. 334. And cf. Mordy *v.* Jones (1825), 4 B. & Cr. 394; Vlierboom *v.* Chapman (1844), 13 M. & W. 230; Philpot *v.* Swann (1861), 11 C. B. N. S. 270.

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of Admiralty on monthly hire, the charterers agreeing to pay the freight during employment and efficient performance of the service, and the owners covenanting that the ship should be seaworthy during the continuance of the charter: provided that if at any time it should appear to the charterers that the ship had become inefficient, the latter should have the right of putting her out of pay, or of making such abatement by way of mulct out of the freight as they should adjudge fit. The owners effected a time policy against, *inter alia*, perils of the seas "on freight outstanding." During the time, the ship became inefficient through perils of the sea, and the charterers refused to pay freight after that date. The Court held that, on the true construction of the charter-party, the freight was lost, not by the inefficiency of the vessel, and therefore not directly by perils of the seas, but owing to the exercise by the charterers of their discretionary power to make the abatement provided for in the charter-party (*z*).

Distinction where charter-party provides that freight shall, apart from election by charterers, automatically cease to be earned.

786. It was pointed out in this case that the result would probably have been different if there had been a stipulation in the charter-party that freight should automatically cease to be payable in the contingencies mentioned. And effect was subsequently given to this distinction in the two recent cases of The Alps and The Bedouin. In the former the vessel was subject to a time-charter, which contained a provision that the hire should cease in the event of loss of time from want of repairs. The owner insured his chartered freight in a time policy against, *inter alia*, fire. A fire took place which necessitated repairs, whereby the hire of the vessel ceased for thirteen days. It was held that the underwriters were liable for the thirteen days loss of freight so caused (*a*). In the latter case the time charter contained a clause whereby the freight, which was payable monthly in

(*z*) Inman SS. Co., Ltd. *v.* Bischoff (1882), 7 App. Cas. 670; Mercantile Ship Co. *v.* Tyser (1881), 7 Q. B. D. 73; with which compare Jackson *v.* Union Marine Ins. Co. (1873), L. R. 8 C. P. 572; 10 C. P. 125; and In re Jamieson and The Newcastle Assoc., [1895] 2 Q. B. 90. See also Nickels *v.* London, &c. Ins. Co. (1900), 6 Com. Cas. 15.

(*a*) The Alps, [1893] P. 109.

Sect. 786. advance, was to cease "in the event of loss of time by breakdown of engines or machinery so as to delay the progress of the steamer for twenty-four hours," and there was a time policy on the chartered freight. Perils insured against caused a breakdown of machinery, whereby the hire ceased for twenty-eight days. In an action on the policy, it was held by the Court of Appeal, approving The Alps, that inasmuch as the clause in the charter-party was put into operation by the immediate action of perils insured against, the underwriters were liable (*b*).

Time-charter clause.

787. In order to protect themselves against liability to pay for loss of freight, sustained under similar clauses to those above referred to, while a vessel is laid up, and also, as appears from the decision in Bensaude *v.* Thames and Mersey Marine Insurance Co., Limited (*c*), to protect themselves against liability to pay for loss of freight under a voyage charter which has been necessarily abandoned owing to delay frustrating the object of the adventure thereby contemplated (*d*), a clause known as the time-charter clause is often inserted by underwriters, by which the policy is "warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise" (*e*).

Cancellation clause.

788. And, similarly, in order to protect underwriters against claims by shipowners for loss of freight arising from the cancellation of the charter-party under which such freight was expected to be earned, a clause has sometimes been inserted in freight policies providing that "no claim arising from the cancelling of any charter" shall be allowed. It follows, however, from the cases which we have already noticed, that the underwriter does not require the protection

(*b*) The Bedouin, [1894] P. 1. Cf. Jackson *v.* Union Marine Ins. Co. (1873), L. R. 8 C. P. 572; 10 C. P. 125, which is distinguishable from Mercantile Ship Co. *v.* Tyser (*ubi supra*) just as The Alps and The Bedouin are from Inman SS. Co. *v.* Bischoff.

(*c*) [1897] A. C. 609. See also Turnbull & Co. *v.* Hull Underwriters' Assoc., [1900] 2 Q. B. 402.

(*d*) See Jackson *v.* Union Marine Ins. Co., *ubi supra*.

(*e*) The words "or otherwise" appear to mean "or from other perils insured against." Turnbull *v.* Hull Underwriters' Assoc., *ubi supra*.

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of such a clause where the cancellation has been due to the exercise by a charterer of an option given by an express clause in a charter-party; for in such a case, though the cancellation may have taken place in consequence of a peril insured against, yet the loss of freight is not directly due to any such peril, but to the exercise of the option (*f*).

On the other hand, in a case where a charter-party was, in fact, put an end to by the direct operation of a peril of the sea, apart from any agreement to that effect, it was held that there was no "cancellation," inasmuch as this term necessarily implied something done by agreement of the parties (*g*). In view of these decisions, it appears that the clause can only apply to a case where a charter-party contains a clause for its own automatic cancellation in a certain event, *e.g.*, the non-arrival of the vessel by a named date—and the non-arrival of the vessel by such date, owing to perils insured against, of itself effects a cancellation, by virtue of the agreement in the charter-party.

The rule of *causa proxima* may prevent shipowner from recovering for loss of lump chartered freight.

789. The rule as to *causa proxima* must be very carefully considered in all cases where a claim is made for an alleged loss of lump chartered freight. Under most charter-parties such freight is wholly payable upon the arrival of the ship, even although she do not bring with her the whole of the agreed cargo; and this is probably so, even in cases where a loss of part of the cargo has been due to causes for which the shipowner is not excused (*h*). The mere fact that part of the cargo has been lost by perils of the sea entails no loss of lump chartered freight, where by the charter-party the whole of such freight is earned notwithstanding such loss. If in such a case the shipowner is unable to obtain his lump freight, his loss will be attributed to the cause which really prevents him from doing so.

(*f*) See Mercantile SS. Co. Ltd. *v.* Tyser (1881), 7 Q. B. D. 73; Inman *v.* Bischoff (1882), 7 App. Cas. 670.

(*g*) In re Jamieson and Newcastle SS. Freight Ins. Assoc., [1895] 2 Q. B. 90 (C. A.).

(*h*) See Merchant Shipping Co. *v.* Armitage (1873), L. R. 9 Q. B. 99 (Exch. Ch.); Brankelow SS. Co. *v.* Canton Ins. Office, [1899] 2 Q. B. 178; Carver on Carriage, s. 350; and other cases there cited.

Sect. 789. Thus, in Brankelow Steamship Co. *v.* Canton Insurance Office (*i*), the plaintiffs chartered the "Brankelow" for a voyage from the River Plate to Liverpool at the lump freight of 3,000*l.*, payable on delivery of the cargo in cash. The charter-party provided that the charterer's liability should cease upon shipment of the cargo, and gave the vessel a lien thereon for all freight—master to sign bills of lading at any rate of freight required by charterers, but not under chartered rates or difference to be settled in cash on signing bills of lading. The charterers fully loaded the ship with a general cargo, and the master signed bills of lading which, instead of reserving a general lien on each portion of the cargo for the whole lump freight, made the goods mentioned in each bill of lading deliverable to the consignees upon payment merely of the bill of lading freight in respect of such goods. The aggregate, however, of the bill of lading freights exceeded the amount of the chartered freight. The plaintiffs effected an insurance with the defendants on "3,000*l.* freight chartered, or as if chartered, &c." In the course of the voyage part of the cargo was lost by perils of the sea, but the ship eventually arrived at Liverpool with the remainder of her cargo, which was worth more than the chartered freight. Owing, however, to such loss of cargo, the sum collected by the plaintiffs in respect of the bill of lading freights upon the cargo delivered fell short of the chartered freight to the extent of 645*l.* In an action upon the policy to recover this deficiency, it was held by the Court of Appeal, affirming Bruce, J., that the loss was due to no peril of the sea, inasmuch as, but for the form in which the plaintiffs had allowed the bills of lading to be framed, the whole of the chartered freight would, notwithstanding the peril of the sea which caused the loss of the cargo, have been receivable from the consignees (*j*).

(*i*) [1899] 2 Q. B. 178. The decision is at present under the consideration of the House of Lords.

(*j*) It is noticeable that no attempt appears to have been made to recover as for a loss of bill of lading freight under the words, "as if chartered." The editors have been unable, after inquiry in the City, to ascertain what is the real meaning of these words.

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790. The word "consequences" is *primâ facie* so opposite in effect to *causa proxima* that the introduction of it into a policy, taken in connection with the subsequent events, gave rise to a discussion of great interest.

Ionides v. The Universal Marine Ins. Assoc.

There was a policy on goods from Rio to New York, "warranted free from capture, seizure and detention, and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots, or commotions." Civil war prevailed in the United States. The Confederates, being in possession of North Carolina, put out a very important light long established on Cape Hatteras, on purpose to destroy the shipping of the Northern States. The ship in question, not aware of this extinction, looked to see the light when in the proper latitude. She had lost her reckoning; the night was dark and squally, with rain, the wind and tide setting upon the coast; and at midnight she grounded seven miles to the south-west of the lighthouse, where she became a total wreck. It was held, that although the ship would have seen the light, and been saved by it, if there, yet the underwriters were not liable, as the only consequence known to insurance law was one that constantly followed the same cause (*k*).

791. The difficulty of practically applying the rule as to *causa proxima* is well shown in two cases, wherein, upon states of facts almost identical, Lord Denman and Story, J., came to diametrically opposite conclusions.

A sum ordered to be paid by the owner of one ship to another for damages caused by collision is not recoverable as a loss by perils of the sea.

The facts of the English case were shortly these:—A ship in the Hooghly river came into collision with a steamer, and considerable damage was done to each; and, after arbitration, it was awarded that each vessel should bear half the joint expenses of the two. Under this award the ship had to pay a balance to the steamer, which the owner of the ship sought to recover from his underwriter as a particular average loss

(*k*) Ionides v. The Universal Marine Assoc. (1863), 14 C. B. N. S. 259; 32 L. J. C. P. 170; followed in Marsden v. City & County Ass. Co. (1865), L. R. 1 C. P. 232.

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De Vaux v. Salvador.

caused "by the perils of the sea." The Court of King's Bench, per Lord Denman, C. J., held that he could not recover, on the ground that the obligation to pay the sum in question was neither "a necessary nor a proximate effect of the perils of the sea, but growing out of an arbitrary provision of the law of nations" (*l*).

But was held to be recoverable in the United States.

In the American case, under very similar circumstances, Story, J., giving the judgment of the Supreme Court of Massachusetts, held the underwriters liable, on the ground that the damages so apportioned on the ship must be regarded as a direct and proximate effect of the collision, and this decision was confirmed by the Supreme Court of the United States (*m*).

"Collision clause."

792. In consequence of the decision in De Vaux *v.* Salvador, the authority of which in the English Courts is now established beyond dispute, it has become the custom for shipowners to protect themselves by what is commonly called the "collision" or "running down" clause, against payments which they may become liable to make to others, in consequence of the negligence of their servants causing or contributing to a collision. This clause takes various forms, several of which are most carefully and elaborately discussed by Mr. McArthur (*n*). The following is the form of what is termed the "Liverpool clause":—

"And it is further agreed that if the ship hereby insured

(*l*) De Vaux *v.* Salvador (1836), 4 A. & E. 420.

(*m*) Peters *v.* Warren Ins. Co. (1838), 3 Sumner's Mass. R. 389; 14 Peters' S. C. R. 99. The only difference in the facts of the American and English cases is that the former was determined by judicial decree, the latter by arbitration; but Story, J., disclaims the notion that this can make any difference in principle between the two cases. Kent, C., approves of, but Phillips elaborately dissents from, the judgment of Story, J., and cites a later case—General Mut. Ins. Co. *v.* Sherwood (1852), 14 Howard's R. 352—in which the Supreme Court of the United States adopted the view of the English Court. Kent, Com. vol. iii. p. 301, n.; 1 Phillips, s. 1137a, and s. 1416. Arnould (2nd ed. p. 791) appears to have agreed with the view of Story, J.

(*n*) Pages 314 and following, and App. iii. For the Institute Clause, see *ante*, s. 10, and Appendix C hereto.

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shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of 8*l.* per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, calculated at the rate of 8*l.* per ton, or, if the value hereby declared amounts to a larger sum, then to such declared value; and in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three-fourth parts of the costs thereby incurred or paid; provided also, that this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of loss of life or personal injury to individuals from any cause whatever."

An important feature of this particular form is the reference to the 8*l.* per ton, this being the sum to which, under the provisions of the Merchant Shipping Act, 1894 (*o*), the shipowner can, in certain cases and by taking proper proceedings, limit his liability in respect of damage to property. The words are inserted in the interest of the underwriter, so as to insure to him the benefit of the statutory limitation, even in cases where the shipowner may be disentitled thereto, and also, in a case where the declared value of the vessel in the policy is less than the amount of the limitation value, to confine his liability to the smaller proportion arrived at by a comparison of the underwriter's subscription with the latter and greater valuation (*p*).

(*o*) Sect. 503, re-enacting s. 54 of the Merchant Shipping Amendment Act, 1862.

(*p*) This point is most carefully worked out by Mr. McArthur, who, at p. 374 (App. iii.), gives the following illustration:—"Supposing that a ship of 1,000 tons register, having a maximum statutory liability of 8,000*l.*, and an insured value

Sect. 792. It is not intended in this work to discuss in detail the distinctions effected by the several differences in wording of the clause under consideration. For such a discussion the reader is referred to the book of Mr. McArthur (*q*). But it is important to notice some points which, apart from special forms, arise upon the general tenor of the clause.

Extent of underwriter's liability under collision clause.

793. One of the most important points which have actually been discussed in our Courts relates to the sum denoted by the expression "the sum which the insured becomes liable to pay, and shall pay." Where a collision takes place between two ships by which both sustain damage, and for which both are held to blame, the rule in Admiralty is that the damages are added together and each vessel bears a half of the whole.

Principle of single liability as distinct from cross liabilities.

Thus, if the damage done to vessel A. amounts to 10,000*l.*, and to vessel B. 6,000*l.*, each vessel is debited with 8,000*l.*, being one-half of 16,000*l.* But it has been decided that in this case it is not correct to say that B. "becomes liable to pay" A. 5,000*l.*, with a cross liability on A. to pay B. 3,000*l.* There is but one liability, and that is a liability on B. to pay A. the difference, 2,000*l.* As between the two shipowners this may be a matter of importance only when one of them is insolvent, or when either or both of them succeed in limiting their liability to the statutory amount of 8*l.* per ton in accordance with the provisions of the Merchant Shipping Act (*r*). As between the shipowner, however, and his own underwriter, to the relations between whom the same principle

of 4,000*l.*, were to incur damages amounting to 4,000*l.*, the assured would recover under this clause only 1,500*l.*, being the proportion of 3,000*l.* (three-fourths of 4,000*l.*), which 4,000*l.*, the insured value, bears to 8,000*l.*, the value to be adopted as the basis for contribution."

(*q*) *Ubi supra.* See also Gow, c. xv., and Owen's Clauses.

(*r*) See The Stoomvart Maatschappy Nederland *v.* The P. & O. Steam Navig. Co. or The Khedive (1882), 7 App. Cas. 795; overruling Chapman *v.* Royal Netherlands Steam Navig. Co. (1879), 4 P. D. 157. It is interesting to note that simultaneously with the decision of the House of Lords in The Khedive, the Supreme Court of the United States came to a similar conclusion in The North Star (1882), 106 U. S. 17. See also The Scotland (1881), 105 U. S. 24.

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applies (*s*), it will be found that in many cases its application makes a substantial difference to the disadvantage of the underwriter, and especially to that of the underwriter on the ship which has sustained damage to the smaller extent. Thus, suppose vessel A. to be damaged to the extent of 10,000*l.*, and vessel B. to that of 6,000*l.*, by a collision for which both are to blame; then, by the rule above mentioned, A. owes B. nothing, and B. owes A. 2,000*l.* A.'s underwriters, therefore, pay 10,000*l.* to her owners on their ordinary policy, nothing in respect of the collision clause, and by subrogation receive the 2,000*l.* from B. B.'s underwriters pay B. 6,000*l.*, and also, under the collision clause, three-fourths of the 2,000*l.* which B. has had to pay A.; for the remaining 500*l.* B., unless otherwise protected, is uninsured. The result is that:—

A.'s underwriters pay . . .	£8,000
B.'s „ „ . . .	7,500
B. loses	500
	£16,000

Were the claims to be considered as cross-liabilities, apart from the principle established in The Khedive (*t*), the figures would work out as follows:—A.'s underwriter would pay 10,000*l.*, and would also pay three-fourths of half of B.'s damage, or 2,250*l.*, under the collision clause. Against this they would be entitled by subrogation to receive from B. 5,000*l.*, or half of A.'s damage. The balance of the half of B.'s damage, viz., 750*l.*, would fall on A. B.'s underwriters would pay 6,000*l.*, and would also pay three-fourths of half of A.'s damage, or 3,750*l.*, under the collision clause; and against this they would likewise be entitled by subrogation to receive from A. 3,000*l.*, or half of B.'s damage. The balance of the half of A.'s damage (1,250*l.*) would, according

(*s*) Cf. The London S.S. Owners' Ins. Co. *v.* The Grampian S.S. Co. (1889), 24 Q. B. D. 32, 663 (C. A.).

(*t*) *Ubi supra.*

Sect. 793. to this method of computation, fall on B. The result is that—

A.'s underwriters would pay . .	£7,250
A. would be unprotected for . .	750
B.'s underwriters would pay . .	6,750
B. would be unprotected for . .	1,250
	£16,000

794. For further examples of how the principle of a single liability works out in different cases—showing, too, how settlements are complicated by limitations of liability, and by claims of cargo-owners in addition to those of ship—the reader is referred to the Appendix in Mr. McArthur's work, where the matter is dealt with. It has been thought necessary thus shortly to discuss the point in this work, especially in view of a clause which is now often inserted in policies, and is, in fact, incorporated with the Institute Clauses—both time and voyage—providing that, unless liability is limited, "claims shall be settled on the principle of cross-liabilities, as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision."

"Cross Liabilities" Clause.

795. It will be noticed that, in order to bring the collision clause into operation, there must be a collision between the ship insured and some other ship or vessel (*u*), and that the only damages insured against are (in the ordinary forms of the clause) sums payable to the owners of the latter vessel in consequence thereof. The shipowner is therefore not protected against liability due to his vessel running into a dock-wall, breakwater, pontoon, or anything that is not another

What is a collision?

(*u*) It has been held, however, by the House of Lords that a collision between A.'s tug and B. is a collision between A. and B. within the meaning of the R. D. C. The Niobe, [1891] A. C. 401.

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ship (*x*); nor, even where there has been a collision between his ship and another ship, is he indemnified in respect to any damages which he may in consequence thereof be compelled to pay to any third person (*y*). But when there has once been a collision within the meaning of the clause, he is protected against all damages, direct or consequential, occasioned thereby, which the owners of the other vessel or of her cargo may be entitled to recover from him. If, for example, in consequence of a collision between vessels A. and B., for which A. is solely to blame, B. makes payments to a third party, for the reimbursement of which A. is responsible, A. may, under this clause, include these payments in his account against his underwriters. Similarly, if in consequence of such a collision B. is forced ashore, or into collision with some other body, the damages thereby occasioned to B. and payable by A. are recoverable under the clause by A. from his underwriters (*z*). The Institute Clauses, however, contain a proviso,

(*x*) This risk is, however, often expressly included. See The Munroe, [1893] P. 248; Union Mar. Ins. Co. *v.* Borwick, [1895] 2 Q. B. 279.

(*y*) This liability is, however, covered by the Institute Clause, which provides for payments made not merely to the owners of the other ship or her cargo, but "to any other person or persons." This Institute Clause, however, did not provide for the case of two vessels belonging to the same owner coming into collision. In such a case, ship A. having been damaged by ship B. owing to the fault of the latter, though entitled to recover from her own underwriters for the actual damage sustained, would not have been able to recover her demurrage, because the common owner could not sue himself. The underwriter on B. therefore escaped liability, B. not having had to pay damages to any third person. Cases of this nature have recently been met by the Sister Ship Clause, now one of the Institute Clauses, which provides that, "should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured."

(*z*) For further instances, see McArthur, 2nd ed. p. 322. Where the underwriters were only liable to reimburse payments made by the assured "in respect of injury to such other ship or vessel itself," it was held by the Court of Appeal, reversing Mathew, J., that the owners of vessel D., which was solely to blame for sinking vessel V., were not entitled to recover from their underwriters a sum which they had been compelled to pay the owners

Sect. 795. which may apply to cases of this nature, protecting the underwriters against liabilities "for removal of obstructions under statutory powers (*a*), for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury."

Limited protection afforded by collision clause.

796. From the above discussion it will be apparent that the running down clause does not apply to every collision which may occasion damages to the shipowner, but that there may frequently be heads of damage which are totally uninsured against; and it will further be remembered that in no case does it purport to insure against more than three-fourths of the damage sustained. Such and similar liabilities, formerly known as "uninsurable," it was the practice and the policy of English underwriters to refuse to cover (*b*), with the object, apparently, of ensuring that the shipowner should be substantially interested in securing the safety of his vessel. And this practice is still adhered to in the ordinary Lloyd's policies, and in those of the principal insurance companies. But in more recent years, in view of the increasing value of the interests exposed to risk in a marine adventure, shipowners have found it necessary to secure for themselves further protection.

Methods of securing complete protection.

Such necessity is, no doubt, partly accountable for the formation and development of certain classes of the modern clubs, or mutual insurance associations, which undertake special risks not covered by ordinary policies. It is sometimes made an express stipulation by the rules of clubs of this class that vessels entered shall be deemed to be fully insured in an ordinary policy on ship with the running-down clause attached, and it is provided that no protection is afforded except in respect of losses which are not covered by such a policy. In recent years underwriters have by degrees

of V., being the expenses which the owners of V. had been compelled to pay River Commissioners for removing the wreck. Burger *v.* Indemnity Mutual Mar. Ins. Co., [1900] 2 Q. B. 348.

(*a*) See The North Britain, [1894] P. 77; Tatham *v.* Burr, [1898] A. C. 382.

(*b*) Gow, 244.

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"Full protection policy."

somewhat enlarged the scope of their insurances (*c*), and eventually a "full protection policy" was introduced by certain Liverpool insurance companies, "which was in effect a Lloyd's policy on the hull of a vessel without the collision clause, but with clauses added dealing with *all* the important liabilities of the shipowner." This form of policy goes far towards giving shipowners the "full protection" which they desire (*d*).

Warranty to remain partially uninsured.

797. Notwithstanding the large business now done by the clubs, and the introduction of full protection policies, Lloyd's and some of the principal companies have, nevertheless, made attempts to keep the shipowner uninsured in respect of some portion, at least, of his risks and liabilities by the insertion, for instance, of a clause whereby the shipowner is made to warrant that he remains to a stipulated extent uninsured elsewhere. A breach of such a warranty would, of course, avoid the policy *in toto*. A question has arisen in our Courts as to whether this warranty is broken by effecting an insurance against the margin of liabilities so reserved by what is known as an "honour policy" which, though legally void, is in practice treated as binding. This question was answered in the affirmative by Kennedy, J., but the Court of Appeal left the point open (*e*). Another similar question has been raised, as to whether a breach of the warranty is committed when a shipowner effects a further valid insurance which in form undoubtedly transgresses the stipulated margin, with the object, however, not of securing further cover, but only of protecting himself against the anticipated insolvency of the

(*c*) *E. g.*, a "four-fourths" running-down clause has in a few cases been agreed to. Gow, 254.

(*d*) See Gow, 254, of which work and Mr. McArthur's the editors have made frequent use, especially in the present context. To these the reader is referred for further information.

(*e*) Roddick *v.* Indemnity Mutual Marine Ins. Co., Ltd., [1895] 1 Q. B. 836; [1895] 2 Q. B. 380; *ante*, s. 637. A similar point has frequently been raised in America on fire policies, where it has been generally held that such a warranty is not broken unless the subsequent insurance is valid. See Hubbard *v.* Hartford Fire Ins. Co. (1871), 33 Iowa, 325, and cases there cited; Thomas *v.* Builders' Fire Ins. Co. (1875), 119 Mass. 121.

Sect. 797. original underwriters. It was decided by Mathew, J., that under such circumstances an owner is justified in taking out additional policies, and commits no breach of his warranty by so doing (*f*). The policy valuation is binding for the purposes of this warranty. Where, therefore, a vessel was valued in the policy at 3,750*l.*, and it was agreed that the assured should keep one-fifth insured, the shipowner was not allowed to prove that her real value was 5,000*l.*, and that not having insured beyond 4,000*l.* he had committed no breach of his undertaking (*g*).

Effect of negligence of the assured or his agents. Where the ship is seaworthy and properly equipped at the outset, the underwriter will be liable for all loss proximately caused by perils insured against, though remotely occasioned by the negligence of the master or crew.

798. It is an established principle in this country that, supposing the vessel, crew and equipments to have been originally sufficient, and a captain to have been provided of competent skill, the underwriter is liable for any loss proximately caused by the perils insured against, although it may have been remotely occasioned by the negligence or misconduct (not amounting to barratry) of the captain or crew, whether such negligence or misconduct consist in omitting some act which ought to be done, or doing an act which ought not to be done, in the course of the navigation (*h*). The law is the same in the United States (*i*).

A Russian ship, which was seaworthy at the outset of the risk, was compelled to winter in a port in the Gulf of Finland under the charge of the mate, and was, owing to his negligence in not extinguishing a fire which he had lighted in her cabin, burnt while he was absent on board another vessel: the Court held that, as the loss of the ship was proximately caused by fire (one of the perils insured against) the

(*f*) General Ins. Co. of Trieste *v.* Cory, [1896] 1 Q. B. 335.

(*g*) Muirhead *v.* Forth and North Sea, &c. Assoc., [1894] A. C. at p. 79.

(*h*) Busk *v.* Royal Exch. Ass. Co. (1818), 2 B. & Ald. 72; Walker *v.* Maitland (1821), 5 B. & Ald. 171; Bishop *v.* Pentland (1827), 7 B. & Cr. 219; Holdsworth *v.* Wise (1828), *ibid.* 794; Shore *v.* Bentall (1828), *ibid.* 798; Phillips *v.* Headlam (1831), 2 B. & Ad. 380; Dixon *v.* Sadler (1839), 5 M. & W. 405; 8 M. & W. 895; Redman *v.* Wilson (1845), 14 M. & W. 476; Trinder & Co. *v.* Thames & Mersey Mar. Ins. Co., [1898] 2 Q. B. 114.

(*i*) See Phillips, Ins. s. 1049; 3 Kent, Com. 304, 306.

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underwriters were liable, though it was remotely occasioned by the negligence of the mate (*k*).

The Court came to the same conclusion in a case where sugars were lost in the course of being conveyed from the ship to the shore, according to the usage of the West Indian trade, in a sloop adequately manned for the purpose, which was drifted on the rocks in consequence of the seamen in charge of her all going to sleep, in gross neglect of their duty (*l*).

A ship, which was obliged, owing to her being a sharp-built vessel, to be lashed to a harbour pier, fell over when the tide left her, and was stove in and stranded in consequence of the gross negligence of the mate in not procuring a rope of sufficient strength for the purpose: the Court, on the same principle, held the underwriters liable (*m*).

A ship insured on an entire voyage out and home, having been seaworthy at the outset, was lost on her passage home by the perils of the sea; the underwriters were held not to be discharged by the captain's negligence and misconduct in sailing with her on this homeward passage in such a state of leakiness as to be obliged to be pumped out by the crew every two hours (*n*).

The master of a vessel which had sailed from Rotterdam to Sunderland in a seaworthy state, on her arriving off a point about four miles from Sunderland, negligently and improperly (but not barratrously) heaved overboard so much of her ballast that the vessel was by a sudden squall driven on her beam ends, sunk and totally lost: the Court held that, as this loss was proximately caused by the perils of the seas, the assured might recover, though it was remotely occasioned by the improper act of the master (*o*).

(*k*) Busk *v.* Royal Exch. Ass. Co. (1818), 2 B. & Ald. 72.

(*l*) Walker *v.* Maitland (1821), 5 B. & Ald. 171.

(*m*) Bishop *v.* Pentland (1827), 7 B. & Cr. 219.

(*n*) Holdsworth *v.* Wise (1828), 7 B. & Cr. 794; Shore *v.* Bentall (1828), *ibid.* 798, *in notis.*

(*o*) Dixon *v.* Sadler (1839), 5 M. & W. 405; affirmed (in error), 8 M. & W. 895.

Sect. 798. A ship engaged in the African teak trade, and insured on a voyage out and home, had been seaworthy at the commencement of the risk, but at Sierra Leone had been so unskilfully loaded by the native lumpers that on commencing her voyage home she was found unable to keep the sea, and was run ashore in order to prevent her sinking in the Sierra Leone river: the Court, upon the same principle as in previous decisions, held the underwriters liable for this loss (*p*).

So, too, damage to cargo by sea-water occasioned, whilst the vessel was loading in port, by the negligence of the crew in leaving open some cocks or valves in the machinery was held to be a loss by perils insured against, and to be recoverable from underwriters notwithstanding such negligence (*q*).

799. This current of authorities firmly establishes the doctrine as stated in the outset; and any *dicta* of the Judges in earlier cases which are opposed to it must, therefore, be considered as overruled (*r*).

And negligence, even of the assured himself, will not preclude him from recovery.

It has been established by a recent decision of the Court of Appeal (*s*) that, even where the peril occasioning the loss has been due to the negligence of the assured themselves, the underwriter will not, on account of such negligence, be relieved from liability. The action was brought by the owners of the "Gainsborough" for a total loss of freight. The loss of freight was due to a stranding; the stranding was due to the negligence of the master. The master was also a part-owner; and the main question in the case was whether or not his claim was barred by his own negligence. It was held that there was no warranty by a part-owner that he would not personally be guilty of negligent navigation

(*p*) Redman *v.* Wilson (1845), 14 M. & W. 476. See also Hodgson *v.* Malcolm (1806), 2 B. & P. N. R. 336; Carruthers *v.* Sydebotham (1815), 4 M. & S. 77.

(*q*) Davidson *v.* Burnand (1868), L. R. 4 C. P. 117.

(*r*) Such as the judgment of Lord Kenyon in Buller *v.* Fisher (1802), 3 Esp. 67, and of Mansfield, C. J., in Hodgson *v.* Malcolm (1806), 2 B. & P. N. R. 336.

(*s*) Trinder & Co. *v.* Thames & Mersey Co., [1898] 2 Q. B. 114.

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during the voyage covered by the policy, and that nothing short of *dolus* or wilful misconduct would disqualify him from recovering. "The risk undertaken by an underwriter upon a policy covering perils of the sea," said A. L. Smith, L. J., "is that if the subject-matter insured is lost or damaged immediately by a peril of the sea, he will be responsible, and, in my judgment, it matters not if the loss or damage is remotely caused by the negligent navigation of the captain or crew, or of the assured himself, always assuming that the loss is not occasioned by the wilful act of the assured" (*t*).

If the master, crew or ship, were originally deficient, this is matter of defence under the plea of unseaworthiness.

Of course, if it can be shown, in the case of a voyage policy, that the master when appointed was wholly incompetent (*u*), that the crew were insufficient (*x*), or the ship in any way unseaworthy at the outset of the risk, this is matter of defence, of which the underwriters may avail themselves under a plea of unseaworthiness.

Loss caused by wilfully sending the ship to sea and keeping her there unseaworthy, is a defence even under a time policy.

Even under a time policy, though it is established law that there is no implied warranty of seaworthiness, it has been held, since the decision to that effect in the House of Lords (*y*), that a plea to a declaration on a time policy, that the vessel was wrongfully and wilfully sent to sea unseaworthy, and kept there unseaworthy and without a proper master and crew, whereby she was lost, is a bar to the action (*z*), and it is always open to the underwriter to show that the loss arose, not from any peril insured against, but directly owing to the unseaworthy condition in which the vessel sailed (*a*).

Where the loss is not proximately

800. So, too, where the loss is not proximately caused by the perils of the sea, but is directly referable to the negli-

(*t*) [1898] 2 Q. B. at p. 124.

(*u*) Tait *v.* Levi (1811), 14 East, 481; see also Gregson *v.* Gilbert (1783), 3 Dougl. 232; Park on Ins. 138.

(*x*) Forshaw *v.* Chabert (1821), 3 Brod. & B. 158.

(*y*) Gibson *v.* Small (1854), 4 H. L. Cas. 353.

(*z*) Thompson *v.* Hopper (1856), 6 E. & B. 172, 937. Cf. Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284.

(*a*) Fawcus *v.* Sarsfield (1856), 6 E. & B. 192; Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455.

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gence or misconduct of the master or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged.

caused by perils of the sea, but is directly referable to the negligence or misconduct (not amounting to barratry) of the agents of the assured, the underwriter will be discharged from his liability.

Thus—to take a case recorded by Emerigon as having actually occurred at the first breaking out of the great plague of Marseilles in 1720—where the master of a ship, part of whose crew had died of the plague on the voyage, sailed into that city with a false bill of health, in consequence of which his ship was ordered to be burnt, this misconduct was held to discharge the underwriters (*b*).

The following English case seems to have proceeded on the same ground:—A ship having been driven ashore near the harbour of St. Thomas (West Indies) was afterwards got off very little injured, and might have been repaired but for the negligence of the agents of the assured in the island, who allowed her to be condemned and broken up after two very hasty and imperfect surveys; Lord Tenterden told the jury that the underwriters would not be liable for the total loss by condemnation and sale, if, in their opinion, such loss had been brought about by the negligence or misconduct of the agents of the assured (*c*).

Loss directly referable to the acts or negligence of the assured himself is not at the risk of

801. And, *à fortiori*, where the loss is not proximately caused by a peril insured against, but is directly referable to the act of the assured himself, the underwriter will not be liable (*d*).

(*b*) 1 Emerigon, c. xii. s. 13, p. 429.

(*c*) Tanner *v.* Bennett (1825), Ryan & Mood. 182. See, as to the *S. P.*, Bradford *v.* Levy (1825), 2 C. & P. 137.

(*d*) Bell *v.* Carstairs (1811), 14 East, 374, has been cited in support of this obvious proposition. The facts in that case were that a neutral American ship was captured by a French privateer, and was afterwards with her cargo condemned by a French Court as prize, upon the express ground that the ship was not furnished with the documents which, according to the treaty between France and the United States, were necessary to prove her American nationality. The plaintiffs, who owned ship, freight and cargo, thereupon brought an action on English policies of insurance, averring a loss by capture. The principal arguments used on behalf of the underwriter were, firstly, that there was an implied warranty in every policy that a vessel should be properly documented, and secondly, that the loss was due to the negli-

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the underwriters.

So, too, it has been held that an assured cannot, by forcing a sale at a port of refuge of a cargo which is partly damaged,

gence of the owners in failing to supply proper documents. Effect was given in some way to the latter contention, and the case was decided in favour of the underwriter, but it is not clear precisely on what ground. There are expressions in the judgment of the Court delivered by Lord Ellenborough which suggest that the *ratio decidendi* of the case was that the loss was due to the condemnation, and not the capture, of the vessel, and that neither the condemnation itself, nor its cause (*i. e.*, the want of necessary documents), was a peril insured against. But it is more likely that the Court simply considered that the assured ought not to be allowed to recover for a loss occasioned by his own negligence, whether due to a peril insured against or not. It is otherwise difficult to understand the care taken to distinguish the case from Dawson *v.* Atty (1806), 7 East, 367, where, under similar circumstances, a loss of cargo was held to be a loss by capture, and the cargo-owner, having no duty to supply documents, and so having been guilty of no negligence or breach of duty in not supplying them, was allowed to recover. On the other hand, it must be conceded that if the case turned on the negligence of the assured, it is inconsistent with the recent decision of the Court of Appeal in Trinder & Co. *v.* Thames & Mersey Marine Ins. Co., [1898] 2 Q. B. 114.

The following passage, cited from the judgment of Collins, L. J., in the latter case (at p. 128), shows the views taken in earlier editions of this work, as well as those of other authorities:—

"The cases based on the absence of documents may be rested on two grounds, assuming that the act of the assured fell short of *dolus*, which is not clear—(a) That in the case of insurance against capture there is an implied contract that the ship shall be properly documented. It is put on this ground by Phillips, s. 745, and by Arnould, p. 668, 5th ed. (b) That capture insured against, being not the mere detention for the purpose of inspection of documents, but the taking 'with intent to deprive the owner of all dominion or right of property over the thing taken' (Arnould, p. 748, 5th ed., citing Emerigon, p. 428), 'the want of documents may be regarded as the proximate cause of the loss.' Willes, J., in Thompson *v.* Hopper, explains these cases on this ground. Referring to Bell *v.* Carstairs, he says:—'The loss was the immediate and direct result of the want of proper papers, and it was the duty of the owner of the ship, by the law which authorized its capture, if not by the general maritime law (see Roccus), to be provided with those papers, and the want of them was the direct, immediate and only cause of the loss.'"

Notwithstanding, however, these weighty expressions of opinion, the editors venture to submit that there is great difficulty in following the fine distinction between loss by capture and loss by condemnation. As soon as the vessel was captured by the privateer, it is submitted that there was a total loss by capture. The subsequent condemnation did not constitute a total loss, but only transformed what was already a total loss constructively into a total loss in respect of which no notice of abandonment need be given. It is

Sect. 801. thereby convert it into a total loss under a policy which is "free from average" (*e*). And, for a similar reason, the underwriter is not liable for losses occasioned by bad stowage (*f*).

Goods carried on deck.

In accordance with a well-recognised usage, the loss of goods carried on deck, that being considered an improper and unsafe place to carry them, is not recoverable under a general policy on goods, unless they are so carried by virtue of a general usage of trade, with which the underwriter must be presumed to have been familiar (*g*). In practice, they are often expressly covered by what is known as an "in and over" clause.

"In and over" clause.

Statutory limitation of owner's responsibility.

802. The extent of the shipowner's responsibility for damage caused to goods, or to another ship, by the acts of the master or mariners is, under the common law of England, limited only by the full amount of the loss or damage sustained (*h*).

With a view to encouraging the shipping interest, our legis-

also to be noticed that the passage cited by Collins, L. J., from the 5th edition of this work was in the 2nd edition (p. 832, see this edition, p. 829) made subject to the qualification that an intent to deprive the owner of his rights of property, though necessary to constitute a "capture" proper, was not requisite to constitute a "taking at sea."

In this context there were cited in former editions of this work (2nd ed. p. 798; 6th ed. p. 732) the two convoy cases of Carstairs *v.* Allnutt (1813), 3 Camp. 497, and Metcalfe *v.* Parry (1814), 4 Camp. 123, as illustrating the principle that an underwriter is discharged whenever it can be shown that the loss was in in any way brought about by a violation of the law to which the assured was privy. It appears, however, that the cases have nothing to do with any such principle. The only point discussed was whether or not there had under particular circumstances been an infringement of the Convoy Acts. If there had, and the assured was privy thereto, the policy was by the express provisions of the Acts—and apart from any principle at present under consideration—*ipso facto* avoided. See 38 Geo. 3, c. 76; 43 Geo. 3, c. 57.

(*e*) Meyer *v.* Ralli (1876), 1 C. P. D. 358.

(*f*) See Emerigon, c. xii. ss. 2, 4, 5. Bad stowage is expressly excepted, even in a "full protection policy."

(*g*) Ross *v.* Thwaite (1776), 1 Park, Ins. 23; Backhouse *v.* Ripley (1802), *ibid.* 24; Da Costa *v.* Edmunds (1815), 4 Camp. 142; Gould *v.* Oliver (1837), 4 Bing. N. C. 134; Milward *v.* Hibbert (1842), 3 Q. B. 120.

(*h*) Maclachlan on Shipping, 121 *et seq.*

lature has at different times passed various Acts in order to limit this responsibility (*i*). The Act at present in force is the Merchant Shipping Act, 1894, which provides as follows:—

The owner of a British sea-going ship or any share therein shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:—

(1.) Where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; or

(2.) Where any gold, silver, diamonds, watches, jewels or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with or secreting thereof (*k*).

And by sect. 503 of the same (*l*) Act: The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity (that is to say),

(a) Where any loss of life or personal injury is caused to any person being carried in the ship;

(b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

(*i*) As to the motives of the legislature, see the preamble of 7 Geo. 2, c. 15; the remarks of Lord Tenterden in Gale *v.* Laurie (1826), 5 B. & Cr. 163; and of Parke, B., in Brown *v.* Wilkinson (1847), 16 L. J. Exch. 36.

(*k*) Merchant Shipping Act, 1894, s. 502.

(*l*) This section has very recently been extended and applied to all cases where (without the actual fault or privity of the owners) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship. Merchant Shipping (Liability of Shipowners and Others) Act, 1900.

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(c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;

(d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship,

be liable to damages beyond the following amounts (that is to say): (i.) In respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, to an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and (ii.) in respect of loss of or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage; and then follow provisions for the ascertainment of the tonnage of vessels, British and foreign.

These important provisions, cited from the Merchant Shipping Act, 1894, are held to limit claims made by owners of foreign as well as British ships, and to apply to occurrences happening outside of British jurisdiction (*m*).

Insurances under the Merchant Shipping Act.

Sect. 506 of the same Act provides for the legality of insurance against the happening without the owner's actual fault or privity of any of the events in respect of which their liability is so limited, and such insurances are specially exempted from the requirements of the Stamp Act (*n*). They have given rise to the Shipowners' Protection Associations or Clubs.

Loss by the acts of the government of the assured.

803. There are two classes of cases in which loss may be occasioned by the public authoritative acts of the government of the assured: those, viz., in which the assured and underwriter are both subjects of the same state, and those in which they are subjects of different states.

(*m*) The Amalia (1863), 32 L. J. Adm. 191.

(*n*) Stamp Act, 1891, s. 93, sub-s. (i).

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In the former class of cases it may now be taken as settled law that the underwriter is liable for all loss occasioned by the public acts of the home government in detaining, arresting or laying an embargo on the ship either in the home or a foreign port (*o*).

In the latter class the nature of the conclusion justified by law will differ according as there is war or peace between the two powers. We have already seen that an insurance on enemy's property is illegal (*p*); we may add that a policy, legal when made, may become invalid by what is tantamount to a declaration of hostilities between the government of the assured and that of the insurer (*q*).

And even as regards time of peace, the principle was laid down, and for a long time tenaciously adhered to by Lord Ellenborough, "that in all questions arising between the subjects of different states, each is a party to the public authoritative acts of his own government; and on that account a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a British subject in a British court of justice as he would be if such act had been done immediately and individually by such foreign subject himself" (*r*). And, applying this principle in a case that came before him, where an embargo had been laid upon native shipping during a time of peace, and in no hostile spirit to any foreign power, Lord Ellenborough held that the assured must be identified with his government and the underwriter therefore discharged (*s*).

No little confusion followed this generalization of a very restricted rule (*t*). The right rule of law was declared by

(*o*) Page *v.* Thompson (1804), at N. P., Park, Ins. 175; Green *v.* Young (1702), 2 Lord Raym. 840; *S. C.*, 2 Salk. 444; see also the *dicta* of Lord Alvanley in Touteng *v.* Hubbard (1802), 3 B. & P. 302; 3 Kent, Com. 291.

(*p*) *Ante*, s. 753.

(*q*) Touteng *v.* Hubbard (1802), 3 B. & P. 291; Aubert *v.* Gray (1862), 3 B. & S. 163; 32 L. J. Q. B. 50. As to what constitutes an outbreak of hostilities, see Driefontein, &c. *v.* Janson, [1900] 2 Q. B. 339, at present under appeal.

(*r*) Per Lord Ellenborough in Conway *v.* Gray (1809), 10 East, 545.

(*s*) Conway *v.* Gray (1809), 10 East, 536; Conway *v.* Forbes (1809), *ibid.*; Mauri *v.* Shedden (1809), *ibid.*

(*t*) Mennett *v.* Bonham (1812), 16 East, 477; Flindt *v.* Crokatt (1812),

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a Court of Error in Bazett *v.* Meyer (*u*), and would have rested there but for the case of Campbell *v.* Innes (*x*). The question was again raised in more recent times, and, it is to be hoped, finally set at rest by the decision of the Exchequer Chamber affirming that of the Queen's Bench, that the assured is not to be identified with the acts of his own government unless the existence of hostilities between it and the government of the insurer renders any such contract of indemnity incompatible with that highest law—the *salus populi*—under the insurer's government (*y*).

In the United States.

In the United States the whole question has come before the consideration of the Supreme Court, and it has there been held, agreeably to the declared principle of the decisions by the English Exchequer Chamber in Bazett *v.* Meyer and Aubert *v.* Gray, that a subject is not to be deemed a party to the peaceful acts of his own government, so as thereby to deprive him of remedy on a policy effected with foreign underwriters in respect of losses caused by such acts (*z*).

Loss of voyage by interdiction of commerce, or blockade or embargo.

Such loss of voyage is not a risk covered by English policies in the common form.

804. In the law maritime received on the Continent of Europe, the compulsory abandonment of the voyage, occasioned by the interdiction of commerce with the port of destination after the commencement of the risk, or by its hostile occupation, embargo, or blockade, is considered to be a risk covered by the policy, and recoverable either as caused by "a restraint of princes," or under the words "compulsory change of voyage."

In this country, however, it has been repeatedly decided, and must now be taken as clear insurance law, that neither interdiction of trade at the port of destination after risk commenced, nor interception of the voyage by blockade, or by the imminent and palpable danger of capture or seizure, amounts

ibid. 522; Flindt *v.* Scott (1812), *ibid.* 525; Simeon *v.* Bazett (1813), 2 M. & S. 94; Campbell *v.* Innes (1821), 4 B. & Ald. 423.

(*u*) 5 Taunt. 824, 829; and see Flindt *v.* Scott (1812), *ibid.* 674.

(*x*) 4 B. & Ald. 423.

(*y*) Aubert *v.* Gray (1862), 3 B. & S. 163, 169; 32 L. J. Q. B. 50. See Driefontein, &c. *v.* Janson, *ubi supra.*

(*z*) Ocean Ins. Co. *v.* Francis (1828), 2 Wend. S. C. R. 64, cited 3 Kent, Com. 292.

to a risk for which English underwriters are answerable under the common form of policy, either as an "arrest, restraint, and detention," or in any other way whatever (*a*). Sect. 804.

The principle on which these decisions rest is the maxim *Causa proxima non remota spectatur*: "the cause of loss must be a peril acting upon the subject insured, immediately and not circuitously;" as is held to be the case where the loss arises from the ship's being prevented from completing her voyage by the impossibility of entering her port of destination without being captured.

Loss of voyage by fear of confiscation.

805. A cargo of pilchards was insured "free of average," by an English ship from the coast of Cornwall to Naples. On her voyage, while sailing under convoy, intelligence was received that all the ports of Naples were shut against English vessels; upon which the commodore of the convoy ordered this ship, amongst others, into Port Mahon, in Minorca, where her cargo was surveyed and sold for a very small sum. The assured, who had abandoned, claimed a total loss; but Lord Alvanley held that the underwriters were not liable, on the ground that "where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated—such circumstances do not amount to a peril operating the total destruction of the thing insured."

"The doctrine (that the assured might abandon in respect of a loss of voyage) is only applicable," said his Lordship, "to cases in which the loss is occasioned by a peril insured against; which, as it appears to me, must be a peril acting upon the subject insured immediately, and not circuitously as in the present case" (*b*).

(*a*) Hadkinson *v.* Robinson (1803), 3 B. & P. 388; Lubbock *v.* Rowcroft (1803), 5 Esp. 50; Blackenhagen *v.* London Ass. Co. (1808), 1 Camp. 454; Parkin *v.* Tunno (1809), 11 East, 22; 2 Camp. 59; Forster *v.* Christie (1809), 11 East, 205.

(*b*) Hadkinson *v.* Robinson (1803), 3 B. & P. 388. See also McSwiney *v.* The Roy. Exch. Ass. Co. (1850),

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Loss of voyage by blockade, fear of capture, &c.

806. This decision has been implicitly followed by the English Courts in all subsequent cases of the same kind.

Thus, where, in an insurance on goods bound to Messina, the ship having arrived at Port Mahon found that Messina was in the hands of or blockaded by the French, and the assured on goods consequently gave notice of abandonment, and went for a total loss—Lord Ellenborough, on the above grounds, held that he could not recover (*c*).

So, where under a policy on goods from London to Revel, the ship, which had passed the Sound and was sailing under convoy towards Revel, was turned back by the commodore on receiving intelligence that an embargo was laid on all British ships in Russian ports, and afterwards, finding the intelligence confirmed, wholly gave up her voyage and sailed back for England with the convoy, but foundered at sea on the passage: Lord Ellenborough, on this state of facts, held that the assured could not recover (*d*).

Goods having been insured from Bristol to Monte Video, or any other port in the River Plate possessed by the English, the ship, immediately on her arrival out, was ordered away by the English commander of Maldonado (the only one of the three ports of the Plate then left in the hands of the English); the ship, thus turned away, being in want of water and repairs, put into Rio Janeiro, the nearest friendly port, for that purpose, and on the way the goods were sea damaged: Lord Ellenborough and the Court of King's Bench were of opinion that the policy containing a contract for a specific voyage could not be extended by implication to cover the ship in her voyage to Rio, notwithstanding the circumstances which had occurred to induce the necessity of it, and refused

14 Q. B. 646; Halhead *v.* Young (1856), 6 E. & B. 312; Chope *v.* Reynolds (1859), 28 L. J. C. P. 194; Nickels *v.* London & Prov. Ins. Co. (1900), 6 Com. Cas. 15.

(*c*) Lubbock *v.* Rowcroft (1803), 5 Esp. 49.

(*d*) Blackenhagen *v.* London Ass. Co. (1808), 1 Camp. 453. The loss in this case was laid in one count "by capture," in another "by perils of the seas."

a rule to set aside a non-suit which his Lordship had entered at the trial (*e*). Sect. 806.

So, where a British ship bound for St. Petersburg was detained in the Baltic by the commander of the British convoy there, from apprehension of Russian embargo, until the embargo actually was laid on, and the further prosecution of the adventure became impossible and the voyage was lost, although if the ship had been suffered to proceed without detention by the convoy she might, in fact, have saved the embargo: Lord Ellenborough and the Court held, as in the last case, that the underwriters on cargo were not liable to the assured, who had duly abandoned, for a total loss (*f*).

In our law, then, the position is clearly established that an interdiction of commerce with the port of destination by means of a blockade or embargo, or possession of the port by an enemy, is not a peril within the policy. It is also established that mere loss of voyage operates in no sense as a loss of cargo; and that an alteration of voyage necessitated by blockade or the like is not covered by an insurance on the voyage originally contemplated.

807. The cases noticed above must be distinguished from cases of the type of Rodocanachi *v.* Elliott. In that case the goods had actually found their way inside Paris when the German army invested the city, and prevented them being forwarded to their ultimate destination. Under these circumstances the assured, who had given notice of abandonment at a time when the detention appeared likely to last for an indefinite time, and brought his action while such detention was still lasting, was held entitled to recover for a constructive total loss of the goods, though they had before trial reached their destination undamaged (*g*). But detention of goods may amount to a constructive total loss.

Another class of cases which must be distinguished from

(*e*) Parkin *v.* Tunno (1809), 11 East, 22. The loss in this case was averred to be "by perils of the sea."

(*f*) Forster *v.* Christie (1809), 11 East, 205.

(*g*) Rodocanachi *v.* Elliott (1873), L. R. 8 C. P. 649; 9 C. P. 518.

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Moreover, these cases do not apply to charter-parties (*i*). This is not because any different meaning is given to the words "restraint of princes" in contracts of carriage and of marine insurance, but because the object of the contracts is different. A restraint may well operate so as to prevent a shipowner from arriving with his ship at a given port, without at the same time causing any damage to the cargo carried.

Law in United States differs.

808. The law in the United States on this subject seems to differ from that of this country. Phillips, after a thorough review of the authorities, states as the better doctrine, that where, after the risk has begun, the voyage is inevitably defeated by blockade or interdiction at the port of departure or destination, or by a hostile fleet being in the way, rendering the proceeding upon it utterly impracticable, or capture or seizure so extremely probable that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge adopted instead of that originally intended; and also, that an assured on the cargo has a right to abandon (*k*). And the law there is apparently the same when the loss of the voyage is occasioned by a just fear of capture, when the danger thereof is imminent, as well as when it is apparently remediless and morally certain (*l*).

Protection afforded in England by proper policies on freight or profits.

Although, however, loss thus occasioned is not recoverable under the common printed form of English policies, parties may by written clauses protect themselves against it; as, for instance, by stipulating that the ship, if turned away from

(*h*) [1898] P. 30.

(*i*) Cf. Geipel *v.* Smith (1872), L. R. 7 Q. B. 404.

(*k*) 1 Phillips, s. 1115; 3 Kent, Com. 292.

(*l*) 3 Kent, Com. 294.

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the port of destination, shall be at liberty, without prejudice to the insurance, to make the nearest friendly port; or the risk of compulsory abandonment of voyage to the port of destination by reason of blockade, embargo, or enemy's occupation, might be inserted as a specific risk, in addition to those ordinarily insured against (*m*).

Under most circumstances the interest which really suffers by a loss of voyage appears to be freight or profits; and such is probably the proper subject to insure against risks of this nature.

Losses due to violation of foreign revenue laws.

809. Unless the policy contains an express exception against the risks of illicit trade, the underwriter is liable for any loss that may arise from the attempted violation of the revenue laws of foreign states (*n*); but this is so, only in so far as he is proved, or must in fairness be presumed, to have been cognizant at the time of underwriting the policy of the intention of violating them.

Thus, if the subject insured be specifically described in the policy, and be an article, the import or export of which is notoriously prohibited by the trade laws of the country to or from whose ports it is insured, the underwriter is liable for the loss caused by its seizure or forfeiture.

Thus, where a policy was effected in France "on silk stuffs," from Spain to a French port, the exportation of such goods being notoriously prohibited by the revenue laws of Spain, the underwriter was held liable for loss occasioned by their seizure in Spain (*o*).

Risk aggravated by subsequent events.

810. It is a general principle which applies to all risks assumed by underwriters, that they continue liable for all losses by the perils insured against, although those perils are greatly enhanced by events that the assured could not prevent.

(*m*) See Naylor *v.* Taylor (1829), 9 B. & Cr. 718.

(*n*) 2 Emerigon, c. xiii. s. 51, pp. 30 *et seq.*; Planché *v.* Fletcher (1779), 1 Dougl. 251; Lever *v.* Fletcher (1780), 1 Marshall, Ins. 45; see also 1 Phillips, Ins. ss. 595—599.

(*o*) 2 Valin, tit. vi. art. 49, and the opinion of Emerigon there given.

Sect. 810. Thus, if capture is one of the perils insured against, and after the policy be made the risk of capture is greatly increased by the breaking out of war, it is clear insurance law that the underwriter, nevertheless, continues liable, for the risk of the declaration of war is considered to be one of the perils he assumes (*p*). But if the policy has thereby become an insurance upon enemy's property, it is in consequence rendered invalid.

Insurance on one subject, loss on another

811. As a general principle the underwriter on one subject of insurance has nothing to do with losses, charges or contributions imposed upon it by reason or on account of another.

Thus the underwriter on goods has nothing to do with freight; all that he insures being the safe arrival of the goods. Hence it is a well-established principle in the law of Marine Insurance that, though sea-damaged goods, if they arrive in specie or in bulk, pay the same freight as though they arrived sound, the underwriter on goods cannot be charged with the detriment the merchant thus sustains by having to pay undiminished freight on a diminished value (*q*); nor can he be charged with any *pro ratâ* freight the merchant may have to pay the shipowner (*r*). But he may be charged under certain circumstances with the increased freight which the merchant is obliged to pay the shipowner in cases of transhipment, when the freight by the substituted exceeds that by the original ship (*s*).

On the same principle the underwriter on goods cannot be called on to make good loss incurred by a forced sale of the goods for the repair of ship (*t*), or loss by fall of the market during delay in estimating an average damage, or loss at

(*p*) Planché *v.* Fletcher (1779), 1 Dougl. 251.

(*q*) Benecke, Pr. of Indemnity, c. i.

(*r*) Baillie *v.* Moudigliani (1785), Park, Ins. 116.

(*s*) See Shipton *v.* Thornton (1838), 9 A. & E. 336, 337; Kidston *v.* Empire Marine Ins. Co. (1867), L. R. 1 C. P. 535; 2 C. P. 357.

(*t*) Powell *v.* Gudgeon (1816), 5 M. & S. 431; Sarquy *v.* Hobson (1823), 4 Bing. 131.

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public auction occasioned by suspicion of damage (*u*), nor the underwriter on the ship to make good expenses incurred by the detention of the goods (*x*).

If, indeed, the same casualty that destroys or damages one subject of insurance thereby also causes a total or partial loss upon another, the underwriters on the latter subject of insurance are chargeable for the loss thus caused. Thus, the perils of the seas that destroy or swallow up ship and goods give a direct claim to a total loss against the underwriters on freight or profits, the earning of which has been rendered impossible by the direct effect of the casualty (*y*).

(*u*) Cator *v.* Gt. Western Ins. Co. of New York (1873), L. R. 8 C. P. 552.

(*x*) Bradford *v.* Levy (1825), Ry. & Mood. 331.

(*y*) Cf. Montoya *v.* London Ass. Co. (1851), 6 Ex. 451; with which compare Field S.S. Co. *v.* Burr, [1898] 1 Q. B. 821; [1899] 1 Q. B. 579 (C. A.).

CHAPTER II.

LOSSES BY THE PERILS INSURED AGAINST.

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812. THE clause in our English policies enumerating the "adventures and perils," against loss by which the underwriters undertake to indemnify the assured, is as follows:—

> "Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof."

Loss by the perils of the seas.

Of all the causes of loss enumerated in our common policies, the most frequent and important are those comprised under the term "Perils of the Seas."

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Meaning of "perils of the seas."

Much difficulty has been felt in defining this expression. The words obviously embrace all kinds of marine casualties, such as shipwreck, foundering, stranding, &c.; as also every species of damage done to the ship or goods at sea by the violent and immediate action of the winds and waves (*a*), as distinct from that included in the ordinary wear and tear of the voyage or directly referable to the acts and negligence of the assured as its proximate cause. And Lowndes (*b*) objected with reason to the limitation imported by the word "violent," pointing out that a calm or a fog may be as dangerous as a storm. A similar objection, too, appears to apply to his proposed substitution of some such word as "unusual" or "accidental," for there may well be calms or fogs which are neither unusual nor accidental, and yet perils of the seas. It is perhaps easier to arrive at a true understanding of the term by suggesting rather what it does not embrace than what it does. It is clear, for instance, that no casualty can be included which is not due to a peril. Furthermore, the peril must be "of the seas." There may be a peril which is not a peril of the seas, and there may be damage caused by the sea without any peril. These points are well brought out and illustrated by a recent judgment of Lord Herschell:— "I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against

(*a*) See per Lush, J., in Merchants' Trading Co. *v.* Universal Mar. Ins. Co. (1870), cited in L. R. 9 Q. B. at p. 596.

(*b*) Marine Insurance, s. 114, 2nd ed.

Sect. 812. events which must happen. It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds or waves. I think that is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category" (*c*).

Similarly, in Hamilton, Fraser & Co. *v.* Pandorf & Co., Lord Halsbury, L. C., said:—"I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident'; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas" (*d*). And, in the same case, Lord Bramwell said:—"An attempt was made to show that a peril of the sea meant a peril of what I feel inclined to call the sea's behaviour or ill-condition. But that is met by the argument, that if so, striking on a sunken rock on a calm day, or against an iceberg, and consequent foundering, is not a peril of the sea or its consequence" (*e*).

813. We proceed to consider the different cases of loss proximately caused by perils of the sea.

Foundering at sea.

Foundering at sea, when proximately caused by the fury of storms and tempests (*ee*), is an obvious case of loss by the perils of the sea. The only difficulty is, the proof of the loss in cases where the ship founders with all on board, or after the crew have left and lost sight of her.

(*c*) Per Lord Herschell in The Xantho (1887), 12 App. Cas. at p. 509. See also Ajum Goolam Hossen and Others *v.* Union Mar. Ins. Co. Ld. (1901), 17 T. L. R. 376, for a case where the assured on ship recovered for a total loss, although the loss did not appear to be traceable to any violence of wind or wave, or to any unusual circumstance.

(*d*) (1887), 12 App. Cas. at p. 524.

(*e*) *Ibid.* at p. 527. Cf. also the judgments in Thames & Mersey Marine Ins. Co., Ltd. *v.* Hamilton, Fraser & Co. (1887), 12 App. Cas. 484.

(*ee*) See, however, n. (*c*), *ante*.

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Presumptive proof.

In such cases it is presumed, if a ship has not been heard of at all for a reasonable time after sailing, or after she was last seen, that she has foundered at sea. The period of time after which this presumption shall take effect is positively fixed for voyages of different length and duration by the laws of many Continental states.

By the French Code de Commerce it is a period of six months for ordinary and one year for distant voyages; and with regard to time policies, it is declared that the loss in such cases shall be presumed to have taken place within the limits of the risk (*f*). The result of this last provision is, that in the case of a missing ship the loss, in the modern law of France, is presumed to have happened immediately after the last news. Thus, if a ship be insured for three months, and, not being heard of, a further insurance is then made for a year, and the vessel is never heard of, in that case the first insurer pays the loss (*g*).

No fixed periods in English law.

814. In our law no fixed periods are established, after which a ship not heard of shall be deemed to have perished at sea; but each case is left to depend on its own circumstances and the judgment of practical men.

Instances.

Thus, a ship insured "from North Carolina to London" had not been heard of for four years after she sailed, when the action was brought. This was held sufficient presumptive proof of an averment in the declaration that the loss had happened "by her sinking at sea" (*h*). A ship insured from Havannah to Flanders, a voyage the average length of which was seven weeks, had not been anywhere heard of for nine months when the action was brought; this was held sufficient proof of foundering at sea (*i*).

In order, however, to lay a foundation for any presumption of this kind, it must be proved that the ship, when she left the port of departure, was really bound for and sailed on the

(*f*) Code de Com. arts. 375, 376.

(*g*) 4 Boulay-Paty, Droit Mar. 252 *et seq.*

(*h*) Green *v.* Browne (1744), 2 Strange, 1199. See also Newby *v.* Read (1763), 1 Marshall, Ins. 388.

(*i*) Houstman *v.* Thornton (1816), Holt, N. P. 242.

Sect. 814. voyage insured (*k*). It is not, however, requisite, in order to support the presumption when once founded, to call witnesses from the foreign outports to prove the fact that the ship has never been heard of there. Thus, where a ship sailed on a voyage from Liverpool to Miramichi in Nova Scotia, and thence to Hayti, it was held unnecessary to call witnesses from Miramichi to support the averment that the ship, before reaching Miramichi, had been lost by the perils of the sea (*l*).

If it be proved that the ship sailed for a given port, the fact of her never having arrived there, (supposing a reasonable time for such arrival to have elapsed before action brought), coupled with the prevalence of a report at her port of departure that she had foundered at sea, will be sufficient *primâ facie* evidence of a loss by the perils of the seas; and even although the crew may have been saved, it will not, in the first instance, be necessary to call any of them to corroborate, by direct evidence, the presumption thus raised, nor to show that plaintiff could not procure their attendance, especially in the case of a foreign ship (*m*). This case seems to dispose of the point which was left undecided in the Nisi Prius decision of Koster *v.* Innes, viz., whether the non-arrival of the ship at the port of destination is evidence of loss by foundering, where the crew have been heard of after the vessel has sailed, and after she is supposed to have been lost (*n*).

Shipwreck. **815.** Shipwreck, when caused by the ship's being driven ashore, or on rocks and shoals in the mid-seas, by violence of the winds and waves (*nn*), is also a clear case of loss by perils of the seas. As regards its effect upon the ship, and also the right of the assured to recover as for a total loss, it is of different kinds.

(*k*) Cohen *v.* Hinckley (1809), 2 Camp. 51; Koster *v.* Innes (1825), Ry. & Mood. 333.

(*l*) Twemlow *v.* Oswin (1809), 2 Camp. 84. In this case the only witness called was the clerk of the owners, who swore the ship had never been heard of since she sailed.

(*m*) Koster *v.* Reed (1826), 6 B. & Cr. 19.

(*n*) Koster *v.* Innes (1825), Ry. & Mood. 333.

(*nn*) As to these words, however, cf. s. 812, *ante*.

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Different kinds of shipwreck.

A ship may either be wrecked in pieces—*i.e.*, so shattered and dislocated as to become a mere congeries of planks—or to have her materials floating about on the waves, having lost all the form and construction of a ship. This is a clear case of total loss, without notice of abandonment.

Or the ship may yet be so shattered and injured as to be irreparable for the purpose of navigating the seas again, except at a cost greater than her worth when repaired: in such case also the loss is considered total, at all events, on giving notice of abandonment.

Or again, the ship, though much broken and shattered, may still retain her form as a ship, and be capable of being repaired for a sum less than her value when repaired; in which case the assured will be entitled to recover as for a total loss if he gives, and the underwriters accept, notice of abandonment, otherwise only for an average loss.

All these cases alike, however—though the amount of damage, and the mode in which the assured acquires a right to indemnity, either in proportion to the actual damage or for the full amount of the insured value, are different—yet all alike fall within losses by "perils of the seas."

So, that which is the immediate and necessary consequence of the wreck is attributable to the same cause of loss. A Russian vessel, from London to Constantinople, ran on a shoal near Gallipoli, and the master at once disembarked bullion of the value of 50,000*l.*, which formed part of the cargo, and placed it in the hands of the Russian Consul. Afterwards this bullion was charged by sentence in the Russian consular court with a percentage, to meet the expense of trying to save the ship and rest of the cargo. This charge was held to be a loss by perils of the sea, which fell upon the insurers of the bullion (*o*).

Stranding.

816. Loss by "stranding" is a loss by perils of the seas, for which the underwriter is liable, unless it falls within the range of any of those principles by which his responsibility is

(*o*) Dent *v.* Smith (1869), L. R. 4 Q. B. 414.

Sect. 816. limited. If, indeed, the ship takes the ground in the usual course of the voyage, and without the intervention of any extraordinary casualty, that is mere wear and tear; there must be something fortuitous, accidental, and not necessarily arising from the ordinary course of the voyage, to make the underwriters liable.

Stranding, where a loss by the perils of the seas, and where wear and tear of the voyage.

A transport in government service took the ground in Boulogne harbour on the ebbing of the tide, and the bottom being hard and uneven, a cracking sound was heard in the ship as from something breaking. On the return of the tide there was a considerable swell in the harbour; the ship struck the ground hard several times, and in the morning eighteen of her knees were found to be broken: this was held to be a loss by perils of the seas (*p*).

In this instance there was a *casus fortuitus*, viz., the ground swell setting into the harbour. But in a case where nothing fortuitous or unexpected occurred, but the ship being in the ordinary course of her voyage, floated when the tide was in, and took the ground when the tide was low, and in consequence became hogged or strained all over, it was held by the Court of Common Pleas that this did not constitute a loss by perils of the seas, for which the underwriters were liable, there having been no accident (*q*).

No loss by perils of the seas, unless ship is water-borne.

817. A loss by perils of the seas can only take place when the ship may fairly be said to be on the seas; at all events, to the extent of being water-borne. Where a ship was damaged owing to her being blown over by a violent gust of wind in a graving dock into which she had been put for repairs, after having discharged her outward cargo at her port of delivery, and in which there was only from two to three feet of water when the loss happened, this was held not to be a loss by the

(*p*) Fletcher *v.* Inglis (1819), 2 B. & Ald. 315. This case was decided on the ground that the swell which set into the harbour was a *casus fortuitus*. Per Maule, J., in Magnus *v.* Buttemer, *infra*. Otherwise the case seems very doubtful, the circumstances being the ordinary circumstances of such a harbour.

(*q*) Magnus *v.* Buttemer (1852), 11 C. B. 876; 21 L. J. C. P. 119.

"perils of the seas," as alleged in the declaration, though the Court admitted that it would be recoverable within the general clause, "other perils and misfortunes," under a count specially describing the cause of loss (*r*). Sect. 817.

It is on this principle that the two following cases seem to have proceeded, in both of which the ship, at the time of the casualty, was under repairs, and, though water-reached, was not water-borne.

A ship whilst being hove down for repairs was found incapable of bearing the strain, and was therefore hauled up on the beach, where she bilged. Lord Kenyon held this not to be a loss by perils of the seas (*s*). So where a ship was hove down on a beach to be cleaned, within the tide-way, and the tide, when it rose, knocked away the shores which supported the ship, in consequence of which she fell over, and damaged her side planking, Mansfield, C. J., and the Court of Common Pleas, held that this loss, though caused by the tide, yet, as it happened on land and when the ship was not water-borne, was not, as alleged in the declaration, a loss by the perils of the seas (*t*).

818. In order to sustain the allegation that the loss was by perils of the seas, or by any other perils insured against, it must be shown that such perils were the proximate cause of the loss. The stranding must have been the proximate cause of the loss.

We have already seen that English law applies this rule with greater strictness to cases of marine insurance than to other cases (*u*). Where there is a succession of causes, then, according to the law of marine insurance, only the last cause must be looked to, and the others rejected, although the result would not have been produced without them (*x*). We have also seen how difficult it very often is to determine, among competing contributory causes ending in the loss of,

(*r*) Phillips *v.* Barber (1821), 5 B. & Ald. 161.

(*s*) Rowcroft *v.* Dunmore (1801), cited 3 Taunt. 227.

(*t*) Thompson *v.* Whitmore (1810), 3 Taunt. 227.

(*u*) *Ante*, s. 783.

(*x*) Per Lord Esher in Pink *v.* Fleming (1890), 25 Q. B. D. 396.

Sect. 818. or damage to, the subject-matter of insurance, what the proximate cause of such loss or damage really was.

"In all cases," says Blackburn, J., delivering judgment in Dudgeon *v.* Pembroke (*y*), "the law regards the proximate cause of the loss, and it would be difficult to find a better example of what Lord Bacon calls the infinity of the 'causes of causes, and their impulsion one on the other,' than is afforded in this case. The ship perished because she went ashore on the coast of Yorkshire. The cause of her going ashore was partly that it was thick weather and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, viz., her being in distress and full of water, was, that when she laboured in the rolling sea she made water, and the cause of her making water was that when she left London she was not in so strong and staunch a state as she ought to have been; and this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent any one who knowingly sent her out in that state from recovering indemnity for this loss."

Whatever difficulty may attend the discriminating of what was the operative, efficient, proximate cause of the loss in any particular case, the necessity as well as importance of making the discrimination is brought into prominence frequently by the effect of express warranties.

Ship stranded, and then captured, held a loss by capture.

819. Where a ship, insured "against capture only," was driven by stress of weather on the enemy's coast, and there, without having received any material damage by the stranding, was captured by the enemy, this was held to be a loss, not by the perils of the sea, but by capture, and therefore recoverable under the policy (*z*).

(*y*) Dudgeon *v.* Pembroke (1874), L. R. 9 Q. B. 581, 595. And so *S. C.*, 2 App. Cas. 284.

(*z*) Green *v.* Elmslie (1792), Peake,

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Partial loss by peril of the seas occasioning total loss by capture. Livie v. Janson.

Where ship and goods, "warranted free from American condemnation," were damaged by perils of the seas, and thereby driven ashore in such a position as to be afterwards seized and condemned by the American Government, Lord Ellenborough held that such subsequent total loss by seizure and condemnation took away from the assured the right to recover in respect to the previous partial loss by the perils of the seas; for though by those perils the progress of the voyage had been stopped, and the ship brought within the reach and effect of the capture and condemnation, which she might otherwise have escaped, yet the substantive total loss by the capture and condemnation was imputable to the latter peril only and not to the previous sea-damage (*a*). This case was said by Lord Campbell to have proceeded on the principle that "if a total loss occurs from which underwriters are exempt, they are not liable for prior partial loss, which, in that event, does not prove prejudicial to the assured" (*b*). And to a like effect are the observations of Willes, J. (*c*):— "In Livie *v.* Janson, what took place before the capture was a simple deterioration of the vessel . . . she was injured but not destroyed as to the whole or part by the perils of the sea; and it was said that her subsequent immediate capture had the effect of entirely putting out of question the previous injury which she had received, because had she been the best vessel that ever sailed the seas, and without any injury whatever, she would have been immediately captured and entirely lost to the assured, and captured by reason of an excepted peril. That appears to me to be wholly inapplicable to a case where there was a previous . . . total loss . . . of the subject-

N. P. 212. "Had the ship been driven on any other coast but that of an enemy," said Lord Kenyon, "she would have been in perfect safety."

(*a*) Livie *v.* Janson (1810), 12 East, 648. As to the effect, however, of a partial loss under one policy followed by a total loss under another, see Lidgett *v.* Secretan (1871), L. R. 6 C. P. 616; and *post*, ss. 1032, 1223.

(*b*) Per Lord Campbell in Knight *v.* Faith (1850), 15 Q. B. 668, 669; 19 L. J. Q. B. 518.

(*c*) In Ionides *v.* The Universal Marine Assoc. (1863), 32 L. J. C. P. at p. 178.

Sect. 819. matter in respect of which the assured seeks to recover, and that by perils of the sea." The learned Judge then refers to Phillips's adverse criticisms (*d*) on the decision in question, which he, nevertheless, thinks may be supported on the lines and subject to the limitations above indicated.

A loss by stranding once constituted remains so, notwithstanding subsequent chance rescue.

820. On the other hand, where the loss by perils of the sea is itself total, it is not deprived of that character by the chance rescue of part from destruction, and appropriation thereof by an enemy.

Thus, where in an insurance on goods "warranted free from capture and seizure," on a voyage "from London to Maracaybo," the ship, when within a few miles of Maracaybo, was driven on a sand bank and totally disabled, and while in that situation the goods, which would otherwise have been entirely destroyed by the sea, were seized as prize by the Spanish royalists, who had shortly before taken possession of the town and port, Best, C. J., and the rest of the Court of Common Pleas, held this to be a loss by perils of the seas; for the perils of the seas were here the main conducing cause of loss, the ship having been by their agency reduced to a total wreck, while the goods must have been, by the same agency, wholly destroyed had not the enemy appropriated them (*e*).

(*d*) Phillips, ss. 1136, 1137, &c., dissents from the decision as being irreconcilable with a rule which he lays down as follows:—"In case of the concurrence of two causes of loss, one at the risk of the assured and the other insured against, or one insured against by A. and the other by B., if the damage by the perils respectively can be discriminated, each party must bear his proportion." In addition, however to the judicial observations quoted above, it is submitted that in Livie *v.* Janson there was no concurrence of causes in the sense proper to insurance law, according to which concurrent causes must be equally conducive to the final loss. The rule which Phillips lays down was approved by the Supreme Court of the United States in Ins. Co. *v.* Transportation Co. (1870), 12 Wall. 194. The facts of the case were that a steamer insured against fire only got into collision, and the collision caused a fire, which fire caused the vessel to sink. But for the fire the vessel could have been saved, and repaired for 15,000 dollars. It was held that for the damage beyond this sum, which was due to the fire alone, the underwriters were liable.

(*e*) Hahn *v.* Corbett (1824), 2 Bing.

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The distinction between the two cases of Livie *v.* Jansen and Hahn *v.* Corbett is well illustrated by Ionides *v.* Universal Marine Association, the facts of which, so far as they are material to the point at present before us, were as follows: 6,500 bags of coffee were insured from Rio Janeiro to New York, warranted free from capture, &c., and from all consequences of hostilities, &c. The ship, being Federal, went ashore near Cape Hatteras, while that and the adjoining country were in possession of the Confederate forces during the American Civil War. The vessel stranded during a breeze amidst a heavy surge about midnight. Early next morning a rope was sent ashore, and some Confederate officers came on board and made prisoners of the captain and crew, but nothing could be done with the ship or cargo in consequence of the surge all that day. Next day the weather and sea moderated sufficiently to have allowed them to land 1,120 bags of the cargo, but for a quarrel between the fishermen and soldiers; and in consequence of that only 120 bags were got out. The weather and sea on the third day became so bad again as to prevent working, and the vessel perished with her cargo by the action of the waves. It was held that the 120 bags landed and taken by the soldiers, and the 1,000 bags additional that might have been landed but for the intervention of the soldiers, were together a loss by hostilities within the meaning of the warranty of excepted perils; and that the rest of the cargo, together with the ship, was a total loss by perils of the sea from the moment of stranding, as from that time it never had been in a condition to be the subject of capture (*f*).

Further instances of the rule as to proximate cause.

821. Upon the same principle that *causa proxima non remota spectatur*, it has been held that the loss on goods sold to defray the expenses of repairing a disabled ship in a port

205. The principle of this case is adopted in the United States. See 3 Kent, Com. 302.

(*f*) Ionides *v.* The Universal Marine Ins. Assoc. (1863), 14 C. B. N. S. 259; 32 L. J. C. P. 170 As to *causa proxima*, a number of cases from the American reports are collected in Campbell's Ruling Cases, vol. xiv. pp. 293—296.

Sect. 821. of distress is not recoverable as a loss by perils of the seas (*g*); and on similar grounds it has also been decided in this country that the loss caused by having to pay to another ship, in pursuance of the award of an arbitrator abroad, half the damages done by a collision is not a loss by perils of the seas (*h*).

If the perils of the seas have been the proximate cause of loss, the assured will not, as we have seen, be precluded from recovering under a count for loss by the perils of the seas, merely because the negligence, unskilfulness, or misconduct of the master and mariners have been the remote occasion of such loss (*i*).

Losses partly due to barratry, and partly to peril of the sea.

Even where the loss is remotely occasioned by barratry, still, if it be proximately caused by the perils of the seas, it will be recoverable under a count alleging it to be so caused: thus Lord Ellenborough held that, supposing the facts to have proved that the captain, having wilfully sailed in a foul wind, afterwards barratrously cut the ship's cable, and let her drift on the rocks, whereby she was lost, this would have entitled the assured to recover under a count alleging a loss by the perils of the seas (*k*).

822. Of course, in order to enable the plaintiff to recover under such a count, the proximate cause of loss must appear to have been a peril of the sea; he cannot under such count recover for a loss merely and wholly barratrous, as for a fraudulent sale or the like.

Combination of causes.

The true rule is, that where the immediate and proximate cause of loss is the sea acting on the subject of insurance, the assured may recover under a count for loss by perils of the seas, notwithstanding previous barratry, which may have led

(*g*) Powell *v.* Gudgeon (1816), 5 M. & S. 431; *S. P.*, Sarquy *v.* Hobson (1823), 4 Bing. 131.

(*h*) De Vaux *v.* Salvador (1836), 4 A. & E. 420. See *contra* in the United States, Peters *v.* Warren Ins. Co. (1838), 3 Sumner, R. 389; 3 Kent, Com. 302, n.

(*i*) See all the authorities collected in the last chapter.

(*k*) Heyman *v.* Parish (1809), 2 Camp. 149.

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to the loss, *i.e.*, without which it would not have happened (*l*).

Where a ship was by mistake taken in tow by a British man-of-war, and was obliged, in order to keep up with her, to carry a press of sail in a gale of wind and a heavy sea, by which she shipped a quantity of water and damaged her cargo, Lord Ellenborough held this to be a loss by perils of the sea; though it might also have been alleged to be by arrest or detention (*m*). Indeed, it is clear that there may, under certain circumstances, be more than one *causa proxima* of a loss. Thus, in Reischer *v.* Borwick, the "Rosa" was insured, not against perils of the sea, but only against damage from collision with any object. She ran against a snag in the river, and, the collision causing a leak, was anchored while the leak was temporarily repaired and the vessel put out of immediate danger. A tug was then sent to tow the "Rosa" to the nearest dock for repairs, but the effect of the motion through the water was to re-open the leak, so that the vessel began to sink and was run aground and abandoned. The Court of Appeal held that the loss was proximately though not exclusively caused by the collision, that both collision and perils of the sea were proximate causes of the sinking of the vessel, and that the underwriters were therefore liable (*n*).

There may be more than one proximate cause.

Damage occasioned to mast, spars, sails, or rigging by carrying a press of canvas to escape an enemy or lee shore, would no doubt be recoverable as a loss by perils of the seas (*o*).

A ship loaded with hides and tobacco, whilst on her voyage, encountered bad weather and shipped much sea-water, whereby the hides were wetted and rendered putrid. Neither

(*l*) See the observations of Gibbs, C. J., in Everth *v.* Hannam (1815), 2 Marsh. R. 74; *S. C.*, in 6 Taunt. 375, and *per curiam* in Blyth *v.* Shepherd (1842), 9 M. & W. 763; Davidson *v.* Burnand (1868), L. R. 4 C. P. 117.

(*m*) Hagedorn *v.* Whitmore (1816), 1 Stark. 157.

(*n*) Reischer *v.* Borwick, [1894] 2 Q. B. 548. Cf. judgment of Lindley, L. J.

(*o*) Covington *v.* Roberts (1806), 2 B. & P. N. R. 378.

Sect. 822. the tobacco nor the packages containing it were immediately in contact with or directly damaged by sea-water, but the tobacco was damaged by the fœtid odour proceeding from the putrid hides. This was held to be a loss by perils of the seas (*p*).

But the words "perils of the seas" do not cover all losses happening upon the seas; they do not embrace all losses happening upon the seas, which may or may not be comprehended under the general sweeping words at the end of the clause enumerating the risks insured against, viz., "all other perils, losses or misfortunes which have or shall come to the hurt, detriment or damage of the said goods and merchandises, ship or any part thereof."

823. But the words, "perils of the seas," only extend to cover losses really caused by sea damage or the violence of the elements, or *vi maris vel tempestatis discrimine;* they do not embrace all losses happening upon the seas, which may or may not be comprehended under the general sweeping words at the end of the clause enumerating the risks insured against, viz., "all other perils, losses or misfortunes which have or shall come to the hurt, detriment or damage of the said goods and merchandises, ship or any part thereof."

Loss caused by being fired into at sea.

Thus, damage sustained by a ship from the fire of another vessel of the same nation mistaking her for an enemy is not, it seems, recoverable as caused by a peril of the sea (*q*); and the damage caused to a merchantman by the fire of the enemy would, it is apprehended, stand on the same ground (*r*), though both, as we shall presently see, are included in the general words, and would be recoverable under a count correctly specifying the cause of loss (*s*).

Loss on live stock may be by perils of the seas, or may be by mortality.

824. It is sometimes, as we have seen in the case of insurances on live stock, a very nice question to draw the line between loss caused by their mortality (*i.e.*, natural death) and by perils of the sea.

It seems that if living animals be deliberately thrown overboard to save the rest, in consequence of a scarcity of provisions occasioned by the gross ignorance of the captain in mistaking his course, and thus protracting the voyage,

(*p*) Montoya *v.* London Ass. Co. (1851), 6 Exch. 451; 20 L. J. Exch. 254.

(*q*) Cullen *v.* Butler (1816), 5 M. & S. 461.

(*r*) Taylor *v.* Curtis (1816), 6 Taunt. 608; 2 Marsh. R. 309.

(*s*) Cf. Thames & Mersey Marine Co., Ltd. *v.* Hamilton, Fraser & Co. (1887), 12 App. Cas. 484.

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this will not be properly described as a loss by the perils of the sea (*t*). So, if they were to perish for want of food, owing to the unavoidable prolongation of the voyage, in consequence of bad and stormy weather, without fault of the captain and crew, this would be a loss by mortality, and not by perils of the sea (*u*).

On the other hand, when a cargo of live stock was so bruised and lacerated by the violent rolling and pitching of the ship in a storm that the animals died shortly afterwards on board, in consequence of the injuries thus received, this was held to be a loss by perils of the sea (*x*); and the Court came to the same conclusion where several horses—having, in consequence of the labouring of the vessel in a violent storm, broken down the slings that supported and the partitions that separated them—kicked each other so severely that they died, in the course of the storm, of the injuries thus received (*y*).

Perils of the seas contrasted with natural causes, or wear and tear.

825. Where, however, the loss is not proximately caused by the agency of the winds and waves, but is merely the natural result of the contemplated action of sea-water on the subject of insurance, or of the ordinary wear and tear of the voyage, it is not recoverable as a peril of the seas, nor indeed under the policy at all.

Damage by worms.

Thus, where the expense of laying down an insufficiently insulated electric cable is lost through the chemical action of the salt water upon the wire, it is not a loss by perils of the sea (*z*). Nor is destruction of the ship's bottom by worms such a loss, at all events in seas where worms ordinarily assail the bottoms of ships; for the loss in such cases comes

(*t*) Gregson *v.* Gilbert (1783), 3 Dougl. 232; Marshall, Ins. 493.

(*u*) Tatham *v.* Hodgson (1796), 6 T. R. 656; and per Lord Tenterden, 5 B. & Ald. 111. Cf. Taylor *v.* Dunbar (1869), L. R. 4 C. P. 206, where carcases became putrid owing to delay occasioned by storm and tempest; and Pink *v.* Fleming (1890), 25 Q. B. D. 396, where fruit went bad partly owing to delay due to a collision.

(*x*) Lawrence *v.* Aberdein (1821), 5 B. & Ald. 107.

(*y*) Gabay *v.* Lloyd (1825), 3 B. & Cr. 793; *S. C.*, 5 Dowl. & Ryl. 641.

(*z*) Paterson *v.* Harris (1861), 1 B. & S. 336; 30 L. J. Q. B. 354.

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within the usual wear and tear of the voyage (*a*). Besides, the assured in such seas ought to take care and secure the ship by copper sheathing against this kind of damage: if, however, he has done so, it is suggested by Phillips, and apparently with much reason, that in cases where the copper sheathing is torn off by the violent action of the perils insured against, in consequence of which the ship's bottom is worm-eaten, the underwriters ought to be liable (*b*).

Damage by rats.

On the same ground the damage done to the ship by rats eating holes in the ship's bottom was held by Lord Ellenborough not to be within the perils insured against by the common form of policy (*c*).

Loss by collision.

826. Loss by collision is, generally speaking, a loss by the perils of the sea. It is nevertheless not uncommon at the present day, especially in cases of re-insurance, to find this risk expressly insured against. Sometimes the insurance is against "collision" merely, which term probably implies the coming into contact of two things, both of which are navigable (*d*). Sometimes, however, the clause is wider, so as to include the risk of striking against, not merely floating or navigable objects, but also structures such as harbours, wharves, piers and the like, or obstructions such as ice or wreck (*e*).

827. Upon the subject of collision between two ships, the law of the Courts of Admiralty as it affects the rights and

(*a*) Rohl *v.* Parr (1779), 1 Esp. 444. Per Lord Halsbury, L. C., Hamilton *v.* Pandorf (1887), 12 App. Cas. 518, 524. So in United States, Martin *v.* Salem Ins. Co. (1807), 2 Mass. R. 429; Hazard *v.* New England Ins. Co. (1834), 8 Peters, S. C. R. 557.

(*b*) 1 Phillips, s. 1101; approved by Chancellor Kent, Com. vol. iii. p. 300, n.

(*c*) Hunter *v.* Potts (1815), 4 Camp. 203; but see Laveroni *v.* Drury (1852), 8 Exch. 166. *Aliter* where damage is caused by incursion of sea-water through a hole gnawed by rats, Hamilton, Fraser & Co. *v.* Pandorf & Co. (1887), 12 App. Cas. 518.

(*d*) See Chandler *v.* Blogg (1897), 3 Com. Cas. 18, per Bigham, J.

(*e*) See The Munroe, [1893] P. 248; Union Mar. Ins. Co. *v.* Borwick, [1895] 2 Q. B. 279,

liabilities of owners and masters was thus laid down by Lord Stowell:— Sect. 827.

"There are four possibilities under which a loss of this sort may occur.

"1st. It may happen without blame being imputable to either party; as where a loss is occasioned by a storm, or by any other *vis major*: in that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree.

"2ndly. A misfortune of this kind may arise when both parties are to blame, where there has been a want of due diligence and skill on both sides; in such a case the rule of law is that the loss must be apportioned between them as having been occasioned by the fault of both.

"3rdly. It may happen by the misconduct of the suffering party alone; and then the rule is that the sufferer must bear his own burden.

"4thly. It may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other" (*f*).

827a. Emerigon, after citing all the learning to be found on the subject in codes and text writers, makes precisely the same division; and lays down the following positions with regard to the liability of the underwriters for losses caused by collision in the different cases just enumerated (*g*). Liability of the underwriter in these different cases.

1st. That where there is no fault on either side, but the collision is purely fortuitous, the loss is to be made good by the underwriters, as caused by a peril of the sea.

To the same effect in our own law it was decided by Lord Kenyon that damage caused by one ship running foul of

(*f*) In The Woodrop, Sims (1815), 2 Dod. Adm. R. 85.

(*g*) 1 Emerigon, c. xii. s. 14, p. 416. The Code de Commerce (art. 407) has incorporated these distinctions into the text of the modern French law.

Sect. 827a. another by misfortune, and without fault on either side, was a loss "by perils of the seas" within the exception of such losses in a charter-party (*h*).

2ndly. Emerigon lays it down that the underwriter is also liable when the fault rests entirely with the master and crew of the other vessel.

Our law is in this point also the same: thus, where the loss was occasioned by another ship running down the ship insured owing to the very gross negligence of the crew of the other vessel (there being only one man on deck, and he asleep), this was held a loss by perils of the seas for which the underwriters were liable under a count so charging it (*i*).

3rdly. Emerigon states that the underwriter is not liable when the collision is entirely owing to the master and crew of the insured ship.

There has been no direct decision in our Courts upon this point. Marshall conceives that in such case the wilful misconduct of the captain or crew would amount to barratry, and the loss, therefore, be recoverable under that head (*k*). But even apart from barratry, it seems impossible now, at any rate since the decisions in Hamilton Fraser *v.* Pandorf (*l*) and Trinder Anderson *v.* Thames and Mersey Marine Insurance Co. (*m*), to contend that the loss would not be recoverable as caused by a peril of the sea.

Opinions of foreign jurists.

Emerigon then proceeds to lay down, 4thly, That in cases in which it is impossible to ascertain where the fault really lies, and the whole amount of damage is therefore apportioned equally between the two ships, then the sum which the insured ship has to pay is a particular average loss, to be made good by the underwriter (*n*).

(*h*) Buller *v.* Fisher (1800), 3 Esp. 67.

(*i*) Smith *v.* Scott (1811), 4 Taunt. 125.

(*k*) 2 Marshall, Ins. 495.

(*l*) (1887), 12 App. Cas. 518.

(*m*) [1898] 2 Q. B. 114; and cf. cases there cited.

(*n*) 1 Emerigon, c. xii. s. 14, p. 417. There is no such rule in English law as sanctions the imputation to A. of damage sustained by B. merely *propter difficultatem probandi culpam*. See this rule of Continental Courts discussed, Maclachlan's Shipping, 318—322.

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Boulay-Paty supports this opinion, on the ground that, as the law has declared it impossible to decide which of the two ships was in fault, it is not to be presumed that either was; but the loss must be regarded as a direct result of the perils of the sea—*i.e.*, of the violent action of the winds and waves, which drove the two ships against one another (*o*).

Valin assumes that the underwriter would in such case be liable, but does not particularly examine the question (*p*); neither does Pothier (*q*); but M. Estrangin, the learned editor of Pothier, investigates it very ably, and concludes "that the damage in such case ought to be regarded as a direct result of a peril of the sea, for which the underwriters on both ships would be liable (*r*).

Law of England.

In this country, as we have seen, when the sum of the damage sustained by both ships is equally divided, then any excess over the loss sustained by the insured ship, which becomes payable to the owners of the other ship, is held not to be recoverable from the underwriter as a loss by perils of the sea (*s*).

Loss by fire.

828. Loss by fire, when caused by lightning or the enemy, is clearly a charge upon the underwriter, under the word "Fire" in our common form of policy (*t*).

Accidental fire is a peril insured against.

So, where ship is burnt to prevent hostile capture, &c.

So, if the ship be burnt under justifiable circumstances, as to prevent capture (*u*), or from an apprehension of contagious disease (*x*), the underwriter is liable.

Spontaneous combustion.

If the fire be occasioned by spontaneous combustion or by

(*o*) Boulay-Paty, Comment. on Emerigon, vol. i. p. 418; and also 4 Droit Mar. 16.

(*p*) 2 Valin, tit. des Avaries, art. 11.

(*q*) Pothier, d'Assurances, No. 50, p. 72.

(*r*) Pothier par Estrangin, 75.

(*s*) De Vaux *v.* Salvador (1836), 4 A. & E. 420. See the previous chapter of this work, and observations on the Collision Clause.

(*t*) 1 Emerigon, c. xii. s. 17, p. 428.

(*u*) Gordon *v.* Rimmington (1807), 1 Camp. 123. Emerigon agrees, and cites Valin and Pothier to the same effect, provided the crew make their escape. 1 Emerigon, c. xii. s. 17.

(*x*) 1 Emerigon, c. xii. s. 17, p. 429. This is doubted by Mr. Maclachlan in the 6th edition of this work, p. 760, n.; and Mr. Gow (Mar. Ins. p. 102) points out that the only reported case, namely, the French decision in The Grand Saint Antoine in 1725, is against this view.

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the damaged state of the goods, the underwriters are not liable (*y*); but if other goods in the same hold, not contributing to the cause of loss, or the ship herself, be burnt in consequence, the underwriters, it seems, are liable; and so they would be for loss of the cargo in case the ignition should turn out to be the consequence of sea damage received after shipment (*z*).

Fire occasioned by the negligence of the master and crew is a peril insured against.

It was for a long time a vexed question whether the underwriters, under a policy in the common form, were liable for a loss proximately caused by fire, but remotely occasioned by the negligence of the master and crew or other agents of the assured. This question in our law is now, as we have already seen, decidedly settled in the affirmative (*a*). And, after some fluctuation in the decisions, the law in the United States seems now to be settled in the same way (*b*).

Of course, where the form of the policy, as is very general on the Continent, excludes the risk of the negligence of the master and crew, or, as in some of the French policies, the barratry of the master, (which word barratry, as there understood, extends not only to the wilful and fraudulent, but also to the negligent, acts of the master), loss by fire so occasioned is not chargeable on the underwriters (*c*).

Loss on rigging, &c., accidentally burnt on a bank saul, where it is generally stowed in the Canton River by the usage of the Chinese trade, is a loss by fire under the common form of policy (*d*).

(*y*) Boyd *v.* Dubois (1811), 3 Camp. 133. In America, Providence Washington Ins. Co. *v.* Adler (1885), 65 Maryland, 162; 1 Emerigon, 430.

(*z*) Cf. Montoya *v.* London Ass. Co. (1851), 6 Exch. 451.

(*a*) Busk *v.* Royal Exch. Ass. Co. (1818), 2 B. & Ald. 73. Cf. Trinder & Co. *v.* Thames & Mersey Co., [1898] 2 Q. B. 114.

(*b*) By the cases of Patapsco Ins. Co. *v.* Coulter (1830), 3 Peters, S. C. R. 222; Columbia Ins. Co. *v.* Laurence (1836), 10 *ibid.* 517; Waters *v.* Merchants' Ins. Co. (1837), 11 *ibid.* 213; 3 Kent, Com. 303, 304.

(*c*) Emerigon, vol. i. pp. 428, 429. The general subject of this section is well and succinctly discussed by Boulay-Paty, who, however, draws all his learning from the vast stores of Emerigon. See Droit Mar. tom. iv. pp. 20—23.

(*d*) Pelly *v.* Royal Exch. Ass. Co. (1757), 1 Burr. 341.

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It appears that there may be a loss by fire, or at least a loss *ejusdem generis*, and covered by the general words in the policy, even where no fire has actually broken out; for instance, where the loss is due to steps taken in anticipation of, and in order to prevent, a fire, which but for such steps would have broken out and itself caused such a loss (*e*). A loss by explosion of steam is not within the general words (*f*).

Losses *ejusdem generis* with fire so as to be covered by the general words.

829. Capture (*g*), properly so called, is a taking by the enemy as prize (*h*), in time of open war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken (*i*). "Capture" by itself probably means belligerent capture only (*k*). Seizure, however, includes other seizures, such as one by revenue officers of a foreign state (*l*).

Capture and seizure, or "takings at sea."

The arrest, or carrying in for adjudication, of neutral ships by belligerent cruisers, though not properly called capture in cases where there is no intent to deprive the owner of his property in the ship, yet falls within the meaning of the words "takings at sea" as one of the perils insured against; and the loss thence arising would be recoverable under a count alleging loss by capture.

What capture properly is.

Capture is deemed lawful when made by a declared enemy lawfully commissioned, and according to the laws of war; unlawful when it is made otherwise. But its legality or illegality does not affect the liability of the underwriter;

Capture, lawful or unlawful.

(*e*) The Knight of St. Michael, [1898] P. 30. The San Roman (1873), L. R. 5 P. C. 301; and Nobel's Explosives Co. *v.* Jenkins, [1896] 2 Q. B. 326, affirmed the same principle.

(*f*) See Hamilton *v.* Thames & Mersey Co. (1886), 17 Q. B. D. 195; 12 App. Cas. 484; disapproving West India Telegraph Co. *v.* Home Ins. Co. (1880), 6 Q. B. D. 51.

(*g*) A modern form of Lloyd's policy contains a warranty against capture, seizure, &c., and against war risks.

(*h*) Mr. Gow (p. 111) points out that "prize" should be "prise," being the Latin "prensus," through the French "prise," and not "pretium," through the French "prix."

(*i*) 1 Emerigon, c. xii. s. 18, pp. 432 *et seq.*

(*k*) Capture by rebels may be sufficient. Mauran *v.* Insurance Co. (1867), 6 Wall. 1.

(*l*) Cory *v.* Burr (1883), 8 App. Cas. 393.

Sect. 829. whether lawful or unlawful, he is equally liable (*m*). Thus, where the policy was on goods "warranted free of capture or seizure," and the proof was that the ship, a British vessel, had been fired into and sunk by the Russians before the declaration of hostilities between Great Britain and Russia, and the crew were detained for some time: the Court, being of opinion, on the whole of the facts, that the object of the Russians was to detain the ship, held that except for the warranty the underwriters would have been liable, but that the warranty protected them (*n*). So, the seizure of the ship by certain mutinous Coolie passengers has been held to be within a similar warranty (*o*), and a piratical seizure of the vessel was held to be a loss within the meaning of the policy (*p*). A British merchantman, when on the coast of Africa, was seized by a British cruiser and carried to St. Helena, where the ship and cargo were condemned as being engaged in the slave trade. This was a mistake in fact, for the decision was on that ground reversed by the Privy Council, and restitution ordered. Yet it was held to be a loss within the policy as a "taking at sea" (*q*).

Whenever capture is the proximate cause of loss, the assured may recover, as on a loss by capture.

Whenever capture is the proximate cause of loss the assured may recover as on a loss "by capture," though other causes may have been contributory thereto. Thus, even where the capture was concerted between the master of the ship insured and the captor, Lord Ellenborough held that the assured might recover as on a loss by capture, though he might also have recovered on a count for barratry (*r*). So, where a ship was driven ashore, with only slight damage, on a hostile coast and there captured, this was held to be a loss by capture, and not by perils of the seas (*s*).

(*m*) Per Lord Mansfield in Goss *v.* Withers (1758), 2 Burr. 683, 694.

(*n*) Powell *v.* Hyde (1855), 5 E. & B. 607.

(*o*) Kleinwort *v.* Shepard (1859), 1 E. & E. 447; 28 L. J. Q. B. 147.

(*p*) Dean *v.* Hornby (1854), 3 E. & B. 180; 23 L. J. Q. B. 129.

(*q*) Lozano *v.* Janson (1859), 2 E. & E. 190; 28 L. J. Q. B. 337.

(*r*) Arcangelo *v.* Thompson (1811), 2 Camp. 620. Of course, the assured must not have been privy to such loss: Australasian Ins. Co. *v.* Jackson (1875), *coram* P. C., 33 L. T. N. S. 286; Wilson *v.* Rankin (1865), 34 L. J. Q. B. 62.

(*s*) Green *v.* Elmslie (1792), Peake,

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Loss by danger of capture.

830. Under certain circumstances underwriters may be liable as for a loss by capture though no capture may have actually taken place. For example, where a voyage is properly abandoned by the master owing to the danger of capture if it were continued, the freight so lost will be recoverable either under the special, or at least under the general words in the policy (*t*).

Capture is, generally speaking, a constructive total loss.

As we shall see more at large hereafter in treating of abandonment, capture is *primâ facie* a case of total loss, which gives the assured an immediate right to give notice of abandonment. If the underwriter accept the abandonment, the rights of the parties are thereby fixed; but if not, the right of the assured to recover for a total loss depends upon the point whether the ship be restored before action brought: if it be, then the assured will recover in proportion to the actual damage done; if not, then the whole sum insured (*u*).

What is requisite to make condemnation valid.

It has long, however, been the established rule of our law maritime that the property is not changed by capture in favour of a vendee or re-captor, so as to bar the original owner, till there has been a regular sentence of condemnation (*x*), and the condemnation, in order to be legal, must be pronounced by a Prize Court of the government of the captor, sitting either in the country of the captor or of his ally. The Prize Court of an ally cannot condemn; nor can a Prize Court of the captor's lawfully act as such in a neutral territory (*y*); but the Prize Court of a captor sitting in the country of his own sovereign, or of an ally, has lawful jurisdiction over prizes carried into neutral ports, and remaining there at the time of passing sentence (*z*).

N. P. 212; see also *S. P.*, Livie *v.* Janson (1810), 12 East, 648.

(*t*) This principle was acted upon in The Knight of St. Michael, [1898] P. 30. See also The San Roman (1873), L. R. 5 P. C. 301; and Nobel's Explosives Co. *v.* Jenkins, [1896] 2 Q. B. 326.

(*u*) Ruys *v.* Royal Exch. Ass. Corp., [1897] 2 Q. B. 135.

(*x*) See 2 Marshall, Ins. 803, where all the authorities are collected.

(*y*) The Flad Oyen (1799), 1 C. Rob. 135; Havelock *v.* Rockwood (1799), 8 T. R. 268; Oddy *v.* Bovill (1802), 2 East, 475.

(*z*) Smart *v.* Wolf (1789), 3 T. R. 283; Schooner Sophie (1805), 6 C.

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Apart from all questions as to abandonment, which will be considered elsewhere, the underwriter is liable for any damage the ship may have actually sustained, and also for all necessary expenses, such as salvage, &c., which the assured has been put to for the recovery of his property; for instance, for a sum of money paid by the neutral assured to belligerent captors as a compromise made *bonâ fide* to prevent the ship from being condemned as prize (*a*).

Ransom.

831. Formerly it was a common practice to ransom British ships when captured by the enemy, by delivering to the captor what was called a ransom bill (*b*). The Legislature, in 1781, wholly abolished this practice by declaring all ransom by British subjects of ships or goods taken by the enemy as prize to be illegal (*c*). Money paid for such a purpose, therefore, was held not to be recoverable from underwriters, whether the condemnation was legal or illegal (*d*).

Risk of British capture cannot be insured against by British underwriters.

We have seen elsewhere that the risk of British capture is not covered by policies effected during war-time with British underwriters (*e*), or by a policy effected before the commencement of hostilities (*f*), although the action be not brought till after their termination (*g*).

Rob. 138, *in notis*; The Henrick and Maria (1799), 4 C. Rob. 43, and in the Court of Appeal, 6 C. Rob. 139; The Purissima Concepcion (1805), 6 *ibid.* 45. Mr. Maclachlan (6th edition of this work, pp. 641, 763; Shipping, p. 22) took a different view on this point, which appears contrary to all authority.

(*a*) Berens *v.* Rucker (1761), 1 W. Bl. 313.

(*b*) For the general law maritime as to ransom, see 1 Emerigon, c. xii. s. 21, pp. 463—480. For the law of France on the subject, see Code de Commerce, arts. 395, 396.

(*c*) The first Ransom Act is the 22 Geo. 3, c. 25. This Act, however, and others of a similar character were repealed by the Naval Prize Acts Repeal Act, 1864. The Naval Prize Act, 1864, gives power to Her Majesty in Council to make regulations on the subject. The present position seems to be that ransom is not illegal, except it be in contravention of such regulations.

(*d*) Havelock *v.* Rockwood (1799), 8 T. R. 268; Parsons *v.* Scott (1810), 2 Taunt. 363.

(*e*) Kellner *v.* Le Mesurier (1803), 4 East, 396; Brandon *v.* Curling (1803), *ibid.* 410.

(*f*) Furtado *v.* Rodgers (1802), 3 B. & P. 191.

(*g*) Gamba *v.* Le Mesurier (1803), 4 East, 407.

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"A policy," says Lord Ellenborough, "containing an insurance against British capture, *eo nomine*, would be illegal and void on the face of it; and an insurance, producing indirectly the same effects, by the application afterwards of the general terms of the policy to the particular event of British capture which has since happened, must, on principle, be equally illegal" (*h*). And the general decision of the Court was, that no peril, the subject of insurance, can be covered under the general terms, "capture," "detention of princes," or the like, which could not, consistently with law, be specifically insured against in direct and express terms.

Prizes made after peace concluded.

As the hostilities of a general maritime war, carried on in many different parts of the globe at once, cannot be supposed to come to an end immediately on the conclusion of peace, it was the general custom to insert into treaties stipulations specifying periods, varying according to distance, after which all prizes made should be restored (*i*). If, however, it could be shown that the captor was, in fact, aware of the peace being proclaimed when he made the prize, such prize, though made before the expiration of the time limited in the treaty, was to be restored (*k*). In this country it was determined, in the time of Lord Hardwicke, that where a ship was seized after a cessation of arms and the signing of preliminary articles of peace, this was not to be deemed a capture, but only an arrest of princes (*l*).

Loss by arrests, detentions, and embargoes.

832. By the terms of our common policies, the underwriter is answerable for all losses occasioned by "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever."

"People."

By the word "people" is meant, not mobs or multitudes of men, but the ruling power of the country, whatever that may be (*m*).

(*h*) 4 East, 402.

(*i*) 1 Emerigon, c. xii. s. 19, p. 452.

(*k*) *Ibid.*

(*l*) Spencer *v.* Franco (1736), Beawes, 316, cited by Lord Mansfield in Hamilton *v.* Mendes (1761), 2 Burr. 1211. But as to this case, see note by Marshall (Insurance, 517). Cf., too, The Eliza Ann (1813), 1 Dods. Ad. R. 244.

(*m*) Nesbitt *v.* Lushington (1792), 4 T. R. 783.

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Arrest as distinct from capture.

An "arrest" takes place whenever the government of the country to which a ship belongs, or any other friendly power, with the object, not of prize (for then it would be a capture), but with a design to restore the ship and goods, or pay the value of them to their owners, seizes the ship and goods for state purposes, either in port or at sea (*n*).

Thus, where a Genoese corn ship was seized at sea by Venetian cruisers, and carried in for the relief of Corfu, then in a state of famine, where it was sold and paid for, it was decided by the rota of Genoa that this was not a capture in respect of which the assured, who had abandoned, could recover for a total loss, but merely an arrest or detention of princes, the object being not to make prize, but to purchase corn (*o*).

In this lies the grand distinction between arrest and capture. Capture is, as we have seen, the forcible taking of a ship, &c., in time of war, with a view to appropriating it as prize. Arrest is a temporary detention of ship, &c., with a view to ultimately releasing it, or repaying its value (*p*).

Detention after declaration of war rather resembles capture than arrest.

Hence the detention of ships in port after declaration of war against the country to which they belong, or by way of reprisals, rather resembles a capture than an arrest (*q*). So, where a neutral ship is arrested at sea by a belligerent cruiser, and, under suspicion of having enemy's goods on board, is carried for search and adjudication into a hostile port; as the result may be the condemnation of ship and cargo, but more especially as the act is done in time of war and as a warlike measure, this is rather to be esteemed a capture than a simple arrest, and accordingly is *primâ facie* a ground of abandonment (*r*).

(*n*) The definition of Boulay-Paty seems concise and accurate: "L'arrêt de prince est l'acte d'un prince ami, qui pour necessité publique, et hors le fait de la guerre, arrête quelque vaisseau ou tous les vaisseaux qui se trouvent dans un port ou rade de ses dominions." Droit Mar., tom. iv. p. 36. See Aubert *v.* Gray (1862), 3 B. & S. 163.

(*o*) Roccus, not. 60, cited 1 Emerigon, c. xii. s. 30, p. 527.

(*p*) 1 Emerigon, *ubi supra*.

(*q*) *Ibid.*; and see 2 Marshall, Ins. 509.

(*r*) Barker *v.* Blakes (1808), 9 East,

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Goods shipped at Shanghai for London *viâ* Marseilles and Paris had arrived in Paris on the 13th of September, 1870, and on the 19th were still there when the German forces surrounded Paris and prevented their being forwarded; this was held to be a loss within those terms of the policy, "arrests, restraints, and detainments of princes, &c." (*s*).

Embargoes.

833. Embargoes are the most common cases of "arrests, restraints, and detainments" of princes. An embargo is an order of government (generally, but not always, issued in contemplation of hostilities) prohibiting the departure of ships or goods from some or all of the ports within its dominions (*t*).

Whether laid upon the property of subjects, or of aliens.

An embargo laid by a foreign government upon the ships or goods of any other than its own subjects entitles the assured at once to give notice of abandonment, and, if the embargo continues down to the time of action brought, to recover as for a total loss. Thus, where a neutral ship and stores, insured "at and from" an enemy's port, were there detained, before sailing, by an embargo laid on by the enemy in the port of loading, and continuing down to the time of action brought, the assured recovered as for a total loss under a count alleging the loss to be by "arrest and restraint of princes" (*u*).

This also is the law of our Courts in case of embargo by a foreign government laid upon the ships of its own subjects, being at the time at peace with this country, and doing this without any view to us. A cargo insured in this country, but belonging to a Spanish subject, and loaded on board a Spanish ship, was detained and unloaded at Corunna by the Spanish Government for the purpose of converting the ship into a transport of war during the hostilities of Spain with Morocco, and the cargo was thereby damaged. This was

283; and see 2 Marshall, Ins. 510; 1 Emerigon, c. xii. s. 30, p. 527.

(*s*) Rodocanachi *v.* Elliott (1873), L. R. 8 C. P. 649.

(*t*) 1 Emerigon, c. xii. s. 30, p. 526.

(*u*) Rotch *v.* Edie (1795), 6 T. R. 413.

Sect. 833. held by the Exchequer Chamber to be a loss for which the underwriters were liable (*x*).

834. There appears to be no doubt that if a British ship be arrested or seized by the British Government from any state necessity, or detained in port by a British laid embargo, this is a loss for which the underwriters are liable as a detention within the meaning of the policy (*y*). Such, accordingly, seems to have been the opinion of our Courts in a case where a British ship was seized by the British Government and converted into a fire-ship (*z*), and in another where such ship was seized and taken in tow by a British man-of-war (*a*).

Foreign law. In fact, there seems no ground of distinction in this respect, as far as concerns the liability of the underwriters, between an arrest or embargo by the home and by a foreign government. Accordingly, the French Code of Commerce has decreed that "arrest by the home government after the commencement of the voyage" is a ground of abandonment (*b*); and Boulay-Paty (*c*) and Estrangin (*d*) show that it rests on precisely the same ground as an arrest by foreign powers.

In French law the risk on the ship does not commence until she has sailed on the voyage, and accordingly the language of the Code is, that abandonment may be made on account of an arrest by the home government after, but not before, the commencement of the voyage (*e*).

In our law, under policies "at and from" a port, the risk on the ship commences while she is at the port undergoing

(*x*) Aubert *v.* Gray (1862), 3 B. & S. 163, 169; 32 L. J. Q. B. 50; overruling Conway *v.* Gray, &c. (1809), 10 East, 536; and Campbell *v.* Innes (1821), 4 B. & Ald. 423. See Simeon *v.* Bazett (1813), 2 M. & S. 94; and Bazett *v.* Meyer (1814) (*S. C.*, in error), 5 Taunt. 824; and *ante*, s. 803. See Driefontein, &c. *v.* Janson, [1900] 2 Q. B. 339, at present under appeal.

(*y*) *Dictum* of Lord Alvanley in Touteng *v.* Hubbard (1802), 3 B. & P. 302.

(*z*) Green *v.* Young (1702), 2 Lord Raym. 840; Salk. 444.

(*a*) Hagedorn *v.* Whitmore (1816), 1 Stark. 157.

(*b*) Arts. 369, 370.

(*c*) 4 Boulay-Paty, Droit Mar. 36—44, 237—240.

(*d*) Estrangin on Pothier, No. 59, pp. 94, 95.

(*e*) Code de Com. arts. 369, 370. See, however, 1 Emerigon, c. xii. s. 30, p. 528; Pothier, Traité d'Assurance, No. 59.

repairs, or otherwise preparing for the voyage insured; and there seems no doubt that if a ship thus insured were arrested or detained by our government in her port of loading, whether with or without her cargo on board, and even before she had broken ground for the voyage, the underwriter would be liable as for a loss by arrest or detention under such a policy (*f*). Sect. 834.

A question has been raised whether, in case goods are seized by a friendly power, or by the home government for state necessities, as in the case of provisions already mentioned, the assured can recover as for a loss by arrest and detention. The better opinion seems to be that if a price be paid for the goods equivalent to their value for the purposes of insurance (*i.e.*, their prime cost, together with the expenses of insuring and loading them on board), the assured can claim nothing; if less than this, he may sue for the difference; if no payment be made, he may recover as for a total loss (*g*).

Wages and provisions during detention by embargo.

835. An arrest, detention, or embargo does not, like a capture, break up the voyage under the charter-party, or at once put an end to a contract of affreightment. On the contrary, the voyage is still supposed to be proceeding on its former terms, the period of detention being considered as a portion of it. Hence, wages and provisions of the crew during a detention by embargo are not chargeable by our law upon the underwriter on ship, as they form part of those ordinary and usual expenses of the navigation which fall exclusively upon the shipowner, and for which he is remunerated out of the freight (*h*).

(*f*) Green *v.* Young (1702), 2 Salk. 444; Rotch *v.* Edie (1795), 6 T. R. 413.

(*g*) 3 Valin, art. 49, p. 127. Pothier, No. 57, as cited and commented upon with various other authorities by Emerigon, c. xii. s. 33, vol. i. pp. 543—545. And cf. Aubert *v.* Gray (1862), 3 B. & S. 163; 32 L. J. Q. B. 50; Driefontein, &c. *v.* Janson, *ubi supra*.

(*h*) Eden *v.* Poole (1785), 1 Park, 117; 2 Marshall, Ins. 730; Robertson *v.* Ewer (1786), 1 T. R. 127; Sharp *v.* Gladstone (1805), 7 East, 32, *in notis*. As to the reasons, however, here assigned for this rule, see Field SS. Co. *v.* Burr, [1899] 1 Q. B. at p. 590, where Collins, L. J., after citing authorities, says that all that underwriters on ship insure against is damage to ship, and that

Sect. 835. The principle is, that the shipowner, in consideration of the freight, owes the services of the crew to the freighter during the whole voyage, and consequently also during the time of detention, which is considered to make part thereof (*i*).

French law. In France the Code de Commerce provides that the wages and provisions of the sailors during a detention of princes shall be particular average when the ship is chartered for the entire voyage (*k*); general average when the ship is hired at so much per month (*l*)—the reason being that as in the latter case the owner receives no freight for the time during which the ship is detained, he does not owe the services of his crew during such time to the freighters, and his providing such services is, therefore, an extraordinary expenditure for the general benefit.

Loss by pirates, rovers and thieves. **836.** Amongst the perils which the underwriters avowedly take upon themselves in our common printed forms of policy are those of "pirates, rovers and thieves." Firstly, of pirates and rovers.

Pirates. Loss thus incurred was formerly included in our maritime law amongst the general perils of the seas (*m*), and probably would still be held to be so; though, as piracy is one of the enumerated perils, the point is of less importance.

Loss on goods by a mob boarding the ship, is a loss by pirates. Where a meal mob on the coast of Ireland violently boarded a corn-laden ship, took the government of her from the captain and crew, ran her on a reef of rocks, and then forced the captain to sell the corn at a low price, Lord Kenyon held that this was a loss by pirates (*n*).

So, loss by crew or passengers. Under the risk of pirates and rovers, the underwriters are, it seems, liable for a mutinous seizure and carrying away of the ship by the crew (*o*).

expenses occasioned by detention or delay are damages suffered by the shipowner, but not by the ship.

(*i*) Benecke, Pr. of Indem. 462; Pothier, Des Charte-Parties, No. 85, cited 1 Emerigon, 529.

(*k*) Art. 403, s. 4.

(*l*) Art. 400, s. 6.

(*m*) 2 Roll. Abr. 248, pl. 10; Cumberbatch, 56, cited 1 Park, Ins. 137; 3 Kent, Com. 302, n.

(*n*) Nesbitt *v.* Lushington (1792), 4 T. R. 783.

(*o*) Brown *v.* Smith (1813), 1 Dow,

Where certain coolie emigrants on a voyage from Canton to Callao piratically and feloniously murdered the captain and part of the crew, and forcibly carried away the ship and the rest of the crew, it was held that this was an act of piracy, or, at all events, an act, *ejusdem generis*, covered by the policy (*p*). Sect. 836.

837. Secondly, of thieves. Thieves.

The theft that is insured against by name in the policy has been considered to mean that which is accompanied by violence (*latrocinium*), and not simple theft (*furtum*); it being an old and elementary rule of the law of insurance that *furtum non est casus fortuitus*, is not one of the fortuitous events against which the owner may seek indemnity by insurance, but one which the law presumes the master might have prevented by the exercise of due vigilance, and the loss arising from which he consequently ought to bear (*q*). Distinction between simple theft and robbery.

Robbery, accompanied by violence, and committed by strangers, not by the crew, is a loss for which the underwriters on the ship or goods are liable as a loss by rovers or

349. In Dixon *v.* Reid (1822), 5 B. & Ald. 597, such loss was laid as loss by barratry, which seems the true mode of alleging it.

(*p*) Naylor *v.* Palmer (1853), 8 Ex. R. 739; affirmed in error (1854), 10 Ex. R. 382; 22 L. J. Ex. 329; 23 L. J. Ex. 323. See Kleinwort *v.* Sheppard (1859), 28 L. J. Q. B. 147; 1 E. & E. 447, where similar facts were held to be within a warranty—free from capture and seizure.

(*q*) See all the learning on this subject collected and lucidly arranged by Emerigon, c. xii. s. 29, "Vol des effets assurés," vol. i. p. 524. This passage, and that which follows, is retained in substance from the 2nd edition of this work (pp. 841, 842). It may be doubted, however, whether, inasmuch as English law recognizes no contract by the assured that he or his servants will not be negligent, it would not be held that *furtum* as well as *latrocinium* are covered by an insurance against thieves. Cf. Trinder & Co. *v.* Thames & Mersey Co., [1898] 2 Q. B. 114. The matter was considered, and the American authorities referred to by the Court of Appeal in Steinman *v.* Angier Line, [1891] 1 Q. B. 619, where it was decided that an exception against thieves in a bill of lading did not relieve the shipowner from liability for thefts committed by persons in the service of the ship. But this decision seems to be based, partly at least, upon the doctrine that words creating an exemption from liability must be construed against the shipowner, and it does not necessarily follow that in a marine policy the construction would be the same.

Sect. 837. thieves under the policy, the maxim being, that *latrocinium fatale damnum seu casus fortuitus est* (*r*).

In the United States.

It has, however, been decided by Chancellor Walworth, in the State of New York, that, under the general word "thieves," in the common form of policy, the assured on ship or goods may recover even for a simple theft committed on the voyage by persons belonging to the ship (*s*). Chancellor Kent, however, in a note, rich with his usual variety of learning and pregnant accuracy of expression, shows that this doctrine not only overrules all the old authorities and text-books, but is of very questionable policy when applied to the owner of the ship (*t*).

In order to obviate all doubt as to the construction of the word "thieves," some American policies, instead of "pirates, rovers, and thieves," contain the words "pirates and assailing thieves."

Plunder by wreckers.

If shipwrecked goods are plundered by wreckers on shore, this was held by Emerigon and Pothier, and has been decided in this country, to be a loss for which the assured on goods may recover under a count for loss by perils of the sea (*u*).

Loss by barratry. Meaning of "barratry" in English law.

838. "Barratry of master and mariners" being one of the perils insured against in our common printed forms of policy, the first question is as to the meaning attached to the word "barratry" in English law. Guided by the etymology of the word, which seems ultimately to have been derived from the

(*r*) Roccus, No. 43, cited by Emerigon, c. xii. s. 29. So held in English law, Harford *v.* Maynard (1785), before Lord Mansfield, cited 1 Park, Ins. 36.

(*s*) Atlantic Ins. Co. *v.* Storrow (1835), 5 Paige, 293; affirmed in Bryan *v.* American Ins. Co., *ibid.* p. 842, in the Superior Court, and also (in error) in the Supreme Court of New York. Kent, Com. vol. iii. p. 303, n. (*a*).

(*t*) 3 Kent, Com. 303, n. (*a*). The learned editor, however, of the 12th edition of Kent's Commentaries (1873) seems to accept the decisions in Storrow's and Bryan's cases as establishing the American law on this point. Parsons, vol. i. p. 564 (ed. 1868), agrees that the weight of American authority would make the insurers liable for loss by simple larceny without violence, and Phillips, s. 1106, takes the same view.

(*u*) 1 Emerigon, c. xii. s. 29, citing Pothier, d'Assurance, No. 55; Bondrett *v.* Hentigg (1816), Holt, N. P. 149.

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Catalan barat (*x*), and proximately from the Italian barratria (*y*), in both of which languages it conveyed the notion of fraud or trick, our Judges for a long time seem to have considered that fraud, or criminal knavery, on the part of the master as against the owners, with a view to benefit himself at their expense, was an essential ingredient in barratry as insured against in English policies (*z*).

Lord Ellenborough, however, in an elaborate decision, reviewing all the preceding authorities, established the position that trick or knavery in the sense of an imposition practised upon the owners by the master, with a view to promote his own benefit at their expense, was not essential to constitute barratry in our law; but that any wilful act of known criminality or gross malversation, even though not intended for the owners' prejudice, nay, even though intended for their benefit, would yet, if in fact it operated to their prejudice, by causing the loss or seizure of the ship, be barratry in the master (*a*).

His Lordship, in the case now referred to, after stating that "a fraudulent breach of duty by the master in respect of his owners, or in other words a breach of duty in respect of his owners with a criminal intention or *ex maleficio*, is barratry," lays it down that it is equally so "whether the act of the

(*x*) 1 Emerigon, c. xii. s. 3, p. 365.

(*y*) Per Lord Mansfield in Vallejo *v.* Wheeler (1774), Cowp. 154.

(*z*) Thus, in the earliest English case on the subject (Knight *v.* Cambridge (1724), 1 Str. 581 (cited 8 East, 135), the Court considered fraud to be the substantial matter constituting barratry. So, Lee, C. J., said: "To make barratry it must be something of a criminal nature." Stamma *v.* Brown (1743), 2 Str. 1173. "Barratry," said Lord Mansfield, "must partake of something criminal, and must be committed against the owner by the master and mariners." Nutt *v.* Bourdieu (1786), 1 T. R. 330. "Whatever is by the master a cheat, a fraud, a cozening, or a trick is barratry." Vallejo *v.* Wheeler (1774), Cowp. 154. "Barratry," says Aston, J., in the case last cited, "comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured." *Ibid.* 155. See also the *dicta* of Willes, J., in Lockyer *v.* Offley (1786), 1 T. R. 252.

(*a*) Earle *v.* Rowcroft (1806), 8 East, 126; Heyman *v.* Parish (1809), 2 Camp. 149.

Sect. 838. master be induced by motives of advantage to himself, malice to the owners, or a disregard to those laws which it was his duty to obey, and which (or it would not be barratry) his owners relied upon his observing."

Definition of barratry.

839. Barratry, then, in English law may be said to comprehend not only every species of fraud and knavery covinously committed by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence, by whatever motive induced, whereby the owners or the charterers of the ship (in cases where the latter are considered owners *pro tempore*) are, in fact, damnified (*b*).

Proof of intent to injure or defraud owners.

With regard, indeed, to the proof of criminal intent necessary to constitute barratry there is an obvious distinction, arising from the different nature of the acts relied upon as barratrous.

Where the act of alleged barratry, as in the case of illegal trading with the enemy, or cutting the ship's cable so as to let her drift on the rocks, is in itself manifestly unlawful or criminally negligent, no proof need be given, in order to show the act barratrous, of the master's having acted with a fraudulent intent to injure his owners; nay, even if it can be shown, as in the case of trading with the enemy, that it was done with a view to the owners' benefit, yet, if it was against, or not in consequence of, his instructions, it will still be barratry.

On the other hand, where the act itself, as in cases of deviation, is not thus, on the face of it, criminal or fraudulent, proof must be given of a fraudulent or criminal intent on the part of the master, either secretly to benefit himself or to injure his owners before such act can be adjudged barratrous (*c*).

(*b*) The tersest and (perhaps) best definition of barratry is that given by Lord Hardwicke in Lewen *v.* Swasso (Postlethwaite's Dict. 147, tit. Assurance), viz., that it is "an act of wrong done by the master against the ship and goods."

(*c*) See the concluding observations of Lord Ellenborough in Earle *v.* Rowcroft (1806), 8 East, 139.

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840. It must also be carefully borne in mind that, in the absence of fraud, nothing but acts of known criminality, gross malversation, or the like (*d*) can amount to barratry; loss arising from the ignorance or incompetence of the captain, from a mistake as to the meaning of his instructions, or misapprehension of the best mode of carrying them into effect, can never amount to barratry. The master, in fact, before he can be proved to have acted barratrously, must be shown to have acted against his better judgment; if he merely acted up to the best of his judgment, however bad, this is not barratry (*e*).

Losses arising from the ignorance or mistake of the captain, however gross, are not losses by barratry, unless he acted against his better judgment.

Thus, where the captain of a sea-damaged ship before survey broke up her ceiling and end-bows with crow-bars and thereby injured her, but no proof was given of his having been actuated by any criminal intent in so doing, Lord Ellenborough said: "To constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment; as the case stands, there is a whole ocean between you and barratry" (*f*).

Another principle, clearly flowing from the true notion of barratry as a criminal act committed by the master against the interest of the owners (whether fraudulently or not), is that no act can be barratrous to which the owners can in any way be shown to have been consenting parties; for no man can take advantage of his own wrong (*g*).

No act can be barratry in the master to which the owners are consenting parties.

841. Having thus indicated the leading principles by which to determine whether a loss is barratrous or not, we will

Cases of loss by barratry.

(*d*) Arnould (2nd ed. p. 845) added, "negligence so gross as to be clearly fraudulent and criminal," but "in the absence of fraud," it is not quite clear what he meant.

(*e*) Phyn *v.* Royal Exch. Ass. Co. (1798), 7 T. R. 505; Todd *v.* Ritchie (1816), 1 Stark. 240; Bottomley *v.* Bovill (1826), 5 B. & Cr. 212.

(*f*) Per Lord Ellenborough in Todd *v.* Ritchie (1816), 1 Stark. 240.

(*g*) See Stamma *v.* Brown (1743), 2 Str. 1173; Pipon *v.* Cope (1808), 1 Camp. 434. Yet by a part-owner, acting as master, against his innocent co-owner, barratry is possible. Jones *v.* Nicholson (1854), 10 Exch. 28; Small *v.* U. K. Marine Ins. Assoc., [1897] 2 Q. B. 42, 311 (C. A.).

Sect. 841. proceed to examine what has been held in practice to amount to barratry.

Sailing out of port without paying port dues, or in breach of an embargo.

In the earliest case it was decided that sailing out of port without paying port dues, whereby the ship and goods were subjected to forfeiture, was barratry (*h*); so sailing out of port without leave in breach of an embargo, in consequence of which the owners afterwards sustained a loss in respect of seamen's wages and provisions, by the detention of the ship, was ruled by Buller, J., and not denied by the full Court, to be barratry (*i*).

Wilful breach of blockade.

So the wilful and intentional breach of a blockade by the master's sailing towards, into, or out of a blockaded port, without the knowledge or consent of the owners, though it may be with a view to their benefit, is barratry (*k*). But this cannot be maintained where the evidence is quite consistent with the supposition that the captain acted either ignorantly or in obedience to orders from his owners (*l*).

In fact, breach of blockade is only barratry in the master when committed by him wilfully and knowingly, and without the consent, though possibly with a view to the interest, of his owners. If committed through ignorance on his part, or by his owners' directions, it is no barratry.

Resistance to right of search, or attempt at rescue.

842. It has been held in the United States, and apparently on good grounds, that the loss of a neutral vessel consequent either upon a wilful resistance to the right of search, or an attempt to rescue her when rightfully detained and sent in for examination by a belligerent cruiser, is a loss by barratry (*m*).

(*h*) Knight *v.* Cambridge (1724), as cited by Lee, C. J., in Stamma *v.* Brown (1743), 2 Str. 1174, and by Lord Ellenborough in Earle *v.* Rowcroft (1806), 8 East, 135, 136.

(*i*) Robertson *v.* Ewer (1786), 1 T. R. 127, cited by Lord Ellenborough in Earle *v.* Rowcroft (1806), 8 East, 139.

(*k*) Goldschmidt *v.* Whitmore (1811), 3 Taunt. 508.

(*l*) Everth *v.* Hannam (1815), 6 Taunt. 375; 2 Marsh. 72, *S. C.* The American authorities are collected by Phillips (ss. 1067, 1068). They do not appear quite consistent, either with one another or our own law.

(*m*) Dederer *v.* Delaware Ins. Co. (1807), 2 Wash. C. C. R. 61; Wilcocks *v.* Union Ins. Co. (1809), 2

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Illegal trading without instructions from owners.

Illegal trading, in consequence of which the vessel is seized and condemned, if knowingly carried on by the captain without the directions, though principally with the view to the benefit, of his owners, is an act of barratry.

In 1804, while England was at war with Holland, an English ship was insured for a slaving voyage from Liverpool to the African coast, there to stay and trade, and proceed thence to a port of sale in the West Indies. The captain, being on the African coast, and not finding a good market in the British settlements there, put into D'Elmina, a Dutch fort on that coast, where he knew it was illegal for him to enter, and there exchanged his cargo for slaves. He had no instructions from his owners to go in there, but his object in so doing was to complete his cargo as cheaply and expeditiously as he could. In consequence of this act his vessel was seized by a British cruiser and condemned.

Lord Ellenborough, upon the principles already stated, held this to be a loss by barratry (*n*).

If a master with knowledge of the Kidnapping Act (35 & 36 Vict. c. 19), prohibiting the carrying of Polynesian labourers in ships without a licence, ship such labourers without a licence and without the consent of his owners, and thereby occasion the seizure and condemnation of the vessel, this is barratry (*o*).

Cruising.

843. Upon the same principle, it is barratry in the captain of a merchant ship to cruise contrary to the intentions and instructions of his owners.

The owners of a ship chartered for a voyage from Liverpool to the West Indies and back furnished her with letters of marque for the homeward voyage, merely for the purpose

Binney's R. 579, cited Phillips, s. 1068. A recognition of the principle contained in these cases is attributed to Buller, J., in Saloucci *v.* Johnson (1799), 2 Park, Ins. 758, cited 8 East, 129; and see Garrels *v.* Kensington (1799), 8 T. R. 230, where no count was inserted for loss by barratry, as significantly remarked by Lawrence, J., p. 235.

(*n*) Earle *v.* Rowcroft (1806), 8 East, 126.

(*o*) Australasian Ins. Co. *v.* Jackson, *coram* P. C. (1875), 33 L. T. N. S. 286.

Sect. 843. of inducing seamen to ship, and without any intention that the vessel should in fact cruise; and accordingly the clearances requisite by statute to authorize the ship to cruise were not taken out. Their instructions to the captain were to proceed from the West Indies to Liverpool with all expedition, no mention being made of the letters of marque. The captain, however, after getting out to sea, with the consent of the major part of the crew, commenced cruising, and, having plundered one American vessel, after some days took another, which he carried into Bermuda, where his own vessel was driven ashore in a storm and the cargo lost.

The Court held that this cruising, though possibly done with a view to benefit the owners, yet, being in fact a breach of his duty to them and resulting to their prejudice, was an act of barratry (*p*).

Smuggling. **844.** Smuggling in fraud of and without the consent of the owners is barratry, and they may recover, even though the ship is only insured by the policy "on any lawful trade"; for these words, "lawful trade," mean the trade in which the ship is employed by her owners, and not any unlawful commerce in which the captain may barratrously engage without their concurrence (*q*). But although the owner may not have directly connived at the smuggling, yet if, by his gross negligence, acts of smuggling have been repeatedly committed by the mariners after warning and within a very short interval, he shall not recover for the loss occasioned by these their barratrous acts. Thus, where a ship had three times been seized after three successive trips for three distinct acts of smuggling by the crew, the owner was not allowed to recover the third time (*r*).

(*p*) Moss *v.* Byrom (1795), 6 T. R. 379.

(*q*) Havelock *v.* Hancill (1789), 3 T. R. 277.

(*r*) Pipon *v.* Cope (1808), 1 Camp. 434. Lord Ellenborough said:— "This is a clear case of *crassa negligentia* on the part of the assured. It was his duty to have prevented these repeated acts of smuggling by the crew. By his neglecting so to do, and allowing the risk to be monstrously enhanced, the underwriters are discharged." The passage in the text is retained from the 2nd edition, p. 849, but it is doubtful whether

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Mutinously carrying the ship out of her course, or purposely running her ashore.

If the ship is violently carried out of her course and fraudulently run away with by the captain and crew, this is a clear case of barratry from the moment the ship is so carried out of her course (*s*). So is purposely running the ship on shore without justifying necessity (*t*), or fraudulently procuring the ship to be condemned and sold. In this latter instance the act of barratry (as a "cause of action" under the Statute of Limitations) dates, not from the period at which the master abandoned the voyage, or even from the condemnation of the ship, but from the completion of the transaction by her delivery and sale (*u*).

Misconduct of the master, though not fraudulent, may be barratrous.

845. In the instances just mentioned the acts of the captain were manifestly criminal and fraudulent, and to the prejudice of the owners; but even in the absence of such fraud, misconduct amounting to gross malversation by the master in his office, if it be to the prejudice of his owners, may amount to barratry.

Thus, where the pilot swore that the captain, who had before refused to sail when the wind was fair, persisted in doing so contrary to his directions when it was unfavourable, and, still disregarding the pilot's instructions, cut the cable, so that the ship drifted on the rocks; Lord Ellenborough held that this, if true, would amount to barratry (*x*).

Nonfeasance may in extreme cases amount to barratry.

There are cases in which to do nothing may be as criminal and mischievous as any positive acts. In such cases there seems little doubt that the wilful nonfeasance of the master, if productive of mischief to the owner, would be barratrous.

Thus, if a master sees another in the act of scuttling or firing the ship, and will not rise from his berth to prevent it,

proof of mere negligence, or of anything short of *dolus*, would now be held to afford the underwriters any defence. See Trinder, Anderson & Co. *v.* Thames & Mersey Co., [1898] 2 Q. B. 114.

(*s*) Falkner *v.* Ritchie (1814), 2 M. & S. 290; Brown *v.* Smith (1813), 1 Dow, 349; Dixon *v.* Reid (1822), 5 B. & Ald. 597; 1 D. & Ryl. 207.

(*t*) Soares *v.* Thornton (1817), 7 Taunt. 627; 1 Moore, 373, *S. C.*

(*u*) Hibbert *v.* Martin (1808), 1 Camp. 538.

(*x*) Heyman *v.* Parish (1809), 2 Camp. 149.

Sect. 845. he is, *primâ facie*, chargeable with barratry; for, though a mere nonfeasance, it is a breach of trust, a fault, an act of infidelity to his owners (*y*).

But, short of this criminal degree of negligence, no loss occasioned by the mere ignorance, incompetence, or carelessness of the master can constitute an act of barratry. Thus, "unless accompanied with fraud or crime, no case of deviation will fall within the true definition of barratry" (*z*).

But deviation from gross ignorance, apart from fraud, is not barratry.

846. A captain, whose instructions were to proceed immediately from London to Jamaica, having been carried by currents out of his reckoning to a point between the Grand Canary and Teneriffe, whence his direct course to Jamaica was south-west, instead of taking it, bore up north-west to Santa Cruz, which was then in sight, where his ship was laid under embargo and condemned as prize. The jury having found that this deviation was not fraudulent, the Court held it not barratrous. Lawrence, J., said "that he knew of no case in which it is said that the act of the captain is barratrous merely because it is against the interest of the owners; it must be done with a criminal intent; the jury here, having negatived fraud, had negatived criminality, therefore this was not a barratrous deviation" (*a*).

Mistake as to meaning of sailing instructions is not barratry.

The captain of a convict ship sailed from London for Sydney, with orders, after discharging his convicts there, to proceed thence for South America, taking New Zealand on his way; some time after he had arrived in Sydney, and after he had made all his arrangements for sailing thence to New Zealand, he received fresh instructions from his owners, directing him to proceed at once from Sydney to the East Indies; under these circumstances the captain resolved, contrary to the letter of his last instructions, to make his

(*y*) Per Johnson, J., in the American case of Patapsco Ins. Co. *v.* Coulter (1830), 3 Peters, S. C. R. 222, cited 1 Phillips, Ins. s. 1074.

(*z*) Per Lord Ellenborough in Earle *v.* Rowcroft (1806), 8 East, 130.

(*a*) Phyn *v.* Royal Exch. Ass. Co. (1798), 7 T. R. 505. N.B.—From this case it is obvious that fraud, in speaking of barratry, means the same thing as criminality.

voyage to New Zealand and back before prosecuting that from Sydney to the East Indies: he sailed accordingly, and the ship was lost on her return from New Zealand. It was contended at the trial that this was barratry in the captain; but Lord Tenterden told the jury that "barratry meant an act of the master in fraud of his duty to his owners," and that a mere mistake or misapprehension by the captain as to the meaning of his sailing instructions, or as to the best means of carrying them into effect, could not amount to barratry (*b*). Sect. 846.

847. Where, on the other hand, the captain deviates from the proper course of the voyage in fraud of his duty to his owners, and for his own private purposes unknown to them, this is an act of barratry from the moment the ship is carried out of her course. *Aliter*, where captain deviates in fraud of his duty to his owners.

The captain of a ship insured from London to Seville sailed for Guernsey, out of the course of the voyage, to take in brandy and wine on a smuggling adventure of his own, unknown to the charterer (who was owner *pro hâc vice*), and the night after sailing sprung a leak, which compelled him to put back and ultimately to abandon the voyage: this was held by Lord Mansfield to be a clear case of barratry (*c*).

Even dropping anchor and going ashore in a boat, to find a market for his own private adventure of negroes on board, was held by Lord Kenyon to be barratry in the captain, commencing from the moment of his first going out of his course for that purpose (*d*).

Unreasonable delay generally, as we have already seen, discharges the underwriter, as a variation of the risk; but where this delay is employed by the captain for the purpose of committing an act of barratry (as by an elaborate forgery of all the ship's documents, &c.), then the delay is part of the barratry for which the underwriters are liable, and not a Or delays.

(*b*) Bottomley *v.* Bovill (1826), 5 B. & Cr. 210.
(*c*) Vallejo *v.* Wheeler (1774), Cowp. 143; *S. C.*, Lofft, 645.
(*d*) Ross *v.* Hunter (1790), 4 T. R. 33.

Sect. 847. deviation by which they are excused (*e*). "Criminal delay," in fact, as expressed by Burrough, J., "is a barratrous act" (*f*).

Detention of the ship and consequent expense owing to an incorrectness in her manifest is not a loss by barratry, unless clear proof be given that the incorrectness was wilful (*g*).

Barratry of the mariners.

848. If the captain is compelled by the mutinous violence of the crew to deviate from his course, though in the teeth of express instructions to the contrary, this will neither be such a deviation as to discharge the underwriters, nor will it be "barratry of the master," although, as it seems, it would be barratry of the mariners (*h*).

There have not been many decisions as to what will amount to barratry by the mariners; but it seems quite clear that when any crime or fraud attended by, or producing, the loss or destruction of the ship be committed by the mariners under such circumstances of violence or treachery that it could not have been prevented by the prudence or vigilance of the owner or of the master or his agent, this will be a loss by barratry of the mariners. On the contrary, if the owner or master might with ordinary force or reasonable vigilance have prevented it, this will not be a loss by barratry of the mariners, as we have seen in the case where the ship was confiscated for repeated acts of smuggling committed by the crew (*i*).

Where the crew overpower the captain or constrain him to consent to their proceedings, the same acts would be barratry in them as in the master.

Thus, where four of the mariners conspired with some

(*e*) Roscow *v.* Corson (1819), 8 Taunt. 684.

(*f*) *Ibid.*

(*g*) Bradford *v.* Levy (1825), Ry. & Mood. 331; 2 C. & P. 137.

(*h*) See the case of Elton *v.* Brogden (1747), as reported in 2 Str. 1264, and commented upon by Lord Mansfield in Vallejo *v.* Wheeler (1774), Cowp. 154; by Lord Alvanley in the case of De Feise *v.* Stephens (1800), at the Cockpit, as cited Marshall, Ins. 523, n. (*b*); and, lastly, by Sir James Mansfield in Scott *v.* Thompson (1805), 1 B. & P. N. R. 186, and 1 Park, Ins. 194.

(*i*) Pipon *v.* Cope (1808), 1 Camp. 434, *ante*, s. 844.

prisoners of war on board and, having overpowered the master and the rest of the crew, ran the ship ashore, where she was captured; as it appeared that the owners and master had not been guilty of any gross negligence in failing properly to secure the prisoners on board, this was held to be a loss by the barratry of the mariners (*k*). And the judgment was the same in a case where only one of the crew, conspiring with some prisoners of war on board, forced the captain and the rest of the crew ashore and ran away with the ship (*l*). Sect. 848.

The rule, in fact, is that where the cause of the loss is a superior force, originating with the crew, the underwriters are liable as for barratry by the mariners.

849. We now proceed to consider by and against whom barratry may be committed. By and against whom barratry is possible.

As we have already seen, it is part of the very definition of barratry that it is an act done by the masters and mariners in fraud of their duty to their owners—*i.e.*, either the parties who are general owners of the ship, or the freighters, who, under the terms of the charter-party, are her special owners for the voyage. The owners.

No act, therefore, can be barratrous which is sanctioned or authorized by those who are either the absolute owners of the ship, or her owners for the voyage. "For," as Lord Mansfield says, "nothing is so clear as that no man can complain of an act to which he himself is a party" (*m*). And in another place he says: "Barratry is something contrary to the duty of the master and mariners in the relation in which they stand to the owners of the ship. An owner cannot commit barratry; he may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry; and, besides, barratry cannot be committed against the owner with his consent" (*n*).

(*k*) Toulmin *v.* Anderson (1808), 1 Taunt. 227; Toulmin *v.* Inglis (1808), 1 Camp. 420.

(*l*) Hucks *v.* Thornton (1815), Holt's N. P. 30.

(*m*) Cowp. 155.

(*n*) Per Lord Mansfield in Nutt *v.* Bourdieu (1786), 1 T. R. 323. This refers to the case of sole owners: a part owner may commit barratry,

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850. Upon these principles it has been decided in the two following cases that the owner of the goods cannot recover as for a loss by barratry in respect of any act of the master, however criminal, that is sanctioned by the owner of the ship.

Owner of goods cannot recover as for a loss by barratry in respect of any act sanctioned by the owner of the ship.

Stamma, the plaintiff, shipped goods on board a vessel which, by the bill of lading, was to sail with them straight from Falmouth to Marseilles, and insured them for the direct voyage; learning afterwards that the ship was to touch at Genoa, Leghorn, and Naples before putting into Marseilles, he protested against it; nevertheless, the ship, by the owner's directions, did put into these ports first, and was blown up by a Spanish ship on her way back to Marseilles. The plaintiff claimed to recover for this as a "loss by barratry;" but it was held that he could not do so, as the master in what he had done had acted consistently with his duty to his owners, and with their privity (*o*).

The master of a French ship, at the instigation and by the direction of his owner, who sailed on board, fraudulently signed false bills of lading, by which he made goods that had been originally consigned to another firm deliverable to the house of which his owner was a partner, and the goods under these false bills of lading were delivered to his owner's firm and never paid for. The shipper of the goods sought to recover their value under a count alleging a loss by barratry; but Lord Mansfield, on the principles above laid down, held that he clearly could not do so (*p*).

Owners of ship cannot recover as for a loss by barratry in respect of acts done by the charterer's agents.

851. Upon the same principle, Lord Ellenborough held that the owner of a ship which had been chartered for a voyage could not recover under a count for barratry for a loss occasioned by an illegal act of the charterer's agent, which *per se* would have amounted to barratry. Hobbs, the general owner of a ship, chartered her for the voyage to

post, s. 852. Jones *v.* Nicholson (1854), 10 Exch. 28; Small *v.* U. K. Marine Ins. Assoc., [1897] 2 Q. B. 42, 311. And in America, Phœnix Ins. Co. *v.* Moog (1884), 78 Ala. 284.

(*o*) Stamma *v.* Brown (1743), 2 Str. 1173. See the remarks of Lord Ellenborough, 8 East, 135, 136.

(*p*) Nutt *v.* Bourdieu (1786), 1 T. R. 323.

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Woodman, who covenanted to pay Hobbs 3,600*l.* in case of loss; Woodman addressed the ship to Kendal, whose orders he desired the captain implicitly to obey: the captain, in compliance with this direction, took in smuggled goods sent on board by Kendal, for which the ship was seized and condemned.

Lord Ellenborough held that Hobbs could not recover as for a loss by barratry, the loss being by construction imputable to himself.

"If I give the dominion of my ship to a charterer," said his Lordship, "his acts are my acts: and in this case Kendal, whose orders the master implicitly obeyed, according to his instructions, was, in point of law, the agent of the plaintiff. Therefore the loss arose from following his own orders, and there is no pretence for imputing it to barratry" (*q*).

A master who is himself owner of the ship.

852. Upon the same principle it is clear that barratry cannot be committed by a master who is himself owner of the vessel. If, however, there be any question whether he is owner or not, it lies upon the underwriters to show that he is so: it is sufficient for the assured to have made out an act *primâ facie* barratrous (*r*).

Where the captain was general owner of the ship which he had bottomried and mortgaged, but of which he still had the control and navigation, Lord Hardwicke held that he could not commit barratry so as to give the assured on goods a claim against his underwriters, as for a loss by barratry (*s*).

So, where the master had given his promissory note for the amount of the purchase-money of a vessel, which was indorsed by another person, to whom the bill of sale was made out, and

(*q*) Hobbs *v.* Hannam (1811), 3 Camp. 94. In Selw. N. P. 976, 9th ed. MS., a case of Boutflower *v.* Wilmer is cited, in which the point decided was, that the owner may recover for an act of barratry committed by the master with the privity of the freighter; but the distinction between these two cases, supposing both can be supported, must depend on the terms of the respective charter-parties, which are not given in either.

(*r*) Ross *v.* Hunter (1790), 4 T. R. 33.

(*s*) Lewin *v.* Swasso (1742), Postlethwaite's Dict. art. Assurance, p. 147.

Sect. 855. the master and crew may be appointed and paid by the general owner. The possession or control thus exercised by the general owners over the master and mariners, such as it is, being, in the words of Lord Ellenborough, "not retained by them in order to restrain or interfere with the full and free use of the ship which they have let to hire for a term, but as subsidiary and subservient to such use" (*a*).

856. Without further reference to the cases on the general question, we proceed to examine those in which the question has been, whether the charterer is so far constituted owner for the voyage as that barratry may be committed against him by the master and mariners, even with the privity or instrumentality of the general owner.

Vallejo *v.* Wheeler. In the first case, that of Vallejo *v.* Wheeler, Willes, the general owner of a ship, had, through Brown, his captain, chartered her to Darwin for a voyage from London to Seville (*b*). Darwin put her up as a general ship, and several merchants, amongst others the plaintiff, sent goods by her, for which they were to pay freight to Darwin: the terms of the charter-party are not set out, but it seems that the master and mariners were hired and victualled by Willes, the general owner.

On the voyage, the master, with the privity of Willes, the general owner, but without the knowledge of Darwin, the charterer, put into Guernsey, which was out of his course, to smuggle wine and brandy on a private adventure of his own: immediately after sailing from Guernsey the ship sprung a leak, to repair which she was obliged to put into Dartmouth,

(*a*) Per Lord Ellenborough in The Trinity House *v.* Clark (1815), 4 M. & S. 288. See Maclachlan, Shipping, 275; Carver on Carriage, ss. 112—117, who points out that the test usually is, whose servants are to be in charge? This is so with respect to liability under contracts of carriage; but, as appears from the cases of Vallejo *v.* Wheeler and Soares *v.* Thornton, which are referred to *infra*, a less rigid test is applied in relation to policies of insurance.

(*b*) The names are reversed in the report in Cowper; but the error is corrected by Buller, J., who had been one of the counsel in the cause, in Nutt *v.* Bourdieu (1786), 1 T. R. 323.

and, in proceeding thence to the coast of Cornwall, where, by the policy, she had liberty to touch, she received further injuries, by which she was totally disabled from completing her voyage, and the goods were much damaged. Sect. 856.

Lord Mansfield held that this act of the master's, although done with the privity of the general owner, yet being committed without the knowledge of Darwin, the charterer, who, under the circumstances, was owner for the voyage, was an act of barratry, for which the assured on goods might recover (*c*).

857. In the next case, Soares & Co., of London, agreed by charter-party with Fontés, the owner and commander of a Portuguese brig, that the ship should take on board, at Pernau, in Russia, on account of Soares & Co., 100 tons of flax, to be delivered at Oporto; Soares & Co. to be at liberty, if they chose, to fill her up with goods, over and above the 100 tons, otherwise the captain might fill her up. The ship was not chartered at a gross sum for the voyage, but freight was payable at so much per ton. The master and crew were hired, paid, and victualled by the owner. The ship, commanded for the voyage by Gouvea, a Portuguese, was entirely filled up at Pernau with as many goods as she could hold by the agents of Soares & Co., the charterers. On her voyage from Pernau to Oporto she was compelled, in consequence of sea-damage, to put into Dover, where Fontés, the owner, came on board, and took the command of her, and shortly afterward, Gouvea assenting, wilfully ran her ashore, by means of which the cargo was wholly lost. Soares v. Thornton.

Gibbs, C. J., held, that as Soares & Co., the charterers, had completely filled up the ship with their own goods at Pernau, the ship must thenceforth have been considered as under their complete control; "they had a right to require that she should then proceed without the control of any other person, except themselves, to her place of destination." At

(*c*) Vallejo *v.* Wheeler (1774), Cowp. 143; *S. C.*, better reported in Lofft, 645.

Sect. 857. the time of the loss, accordingly, they were exclusive owners; and the act which produced the loss having been committed without their concurrence, though with the connivance of the general owner, was, as against them, barratry (*d*).

Barratry as to charterers.

This case, therefore, decides that whenever charterers are so circumstanced at the time of loss as to have a right to the complete control and management of the ship, they are owners for the purposes of barratry, and barratry may be committed against them with the connivance of the general owners.

The principle of decision adopted in the American cases on this subject appears to be somewhat different from our own, and the charterer there seems not to be considered owner for the purposes of barratry, except in those comparatively rare cases where the ship is absolutely demised, and the master and mariners are hired, paid and victualled by him (*e*).

Rule of *causa proxima* less stringently applied to cases of barratry.

858. Loss by barratry seems to form an exception to the general rule of *causa proxima non remota spectatur:* it is not necessary (in fact it hardly ever is the case) that the barratrous act should be the proximate cause of the loss; if there have been barratrous conduct on the part of the master and mariners, and a loss subsequently happens as a remote, though not as a direct, consequence of the act of barratry, or if the barratrous act have only been a co-operative cause of loss, in conjunction with some other peril, this is still enough to entitle the assured to recover under a count for barratry.

Indeed, it might be inferred from the language of Lord Mansfield, in Vallejo *v.* Wheeler, that, even though the subsequent loss be not in any degree referable to the act of barratry, still the loss may be recovered as a loss by barratry (*f*);

(*d*) Soares *v.* Thornton (1817), 7 Taunt, 627; *S. C.*, 1 Moore, 373.

(*e*) See the American decisions collected and commented upon by 1 Phillips, Ins. s. 1083. Parsons, however, chiefly relies on the English cases cited above, and states the law to be as laid down in the text. 1 Parsons, Ins. 565—575.

(*f*) Whether the loss happened in the act of barratry (that is, during the fraudulent voyage), or after, it is immaterial. Cowp. 155.

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but it must be remembered that the case was one of barratrous deviation; and besides, as his Lordship himself adds, "there was a great deal of reason to say that the loss sustained was in consequence of the fraudulent deviation" (*g*).

The true position seems to be, that the loss ought to be referable, at all events, in the way of remote consequence, to the prior act of barratry, although not necessarily in the way of immediate and direct effect (*h*).

Instances where the loss has been proximately caused by other perils but remotely by barratry.

859. Where, however, other perils have proximately caused the loss, it may be recovered under a count alleging it to be by those perils, though barratry may have been a co-operative or conducing cause.

Thus, if a ship were dashed to pieces by the winds and

(*g*) Cowp. 155.

(*h*) This passage is retained from the 2nd edition of this work (p. 862), and was accepted as a correct statement of the law by Field and Cave, JJ., and by Lord Coleridge, and Brett and Cotton, L. JJ., in delivering their judgments in the Queen's Bench Division and the Court of Appeal, in the case of Cory *v.* Burr (1881), 8 Q. B. D. 313, and 9 Q. B. D. 463. In the House of Lords, however, Lord Blackburn (8 App. Cas. at p. 398) took the opportunity of expressing his opinion that there is no authority for such a rule other than that of this text-book, and that the instances here given in support of it are all more properly to be explained as cases in which the Courts thought that the cause of loss was barratry, and that the consequence for which the parties were entitled to indemnity was not a remote consequence. Lord Bramwell, in the same case (at p. 404), merely expressed a doubt on the point. Notwithstanding Lord Blackburn's dissent, it is submitted that the cases referred to cannot satisfactorily be explained if the rule of *causa proxima* is to be rigidly adhered to. Thus, in addition to the cases cited below, in Earle *v.* Rowcroft (1806), 8 East, 126, it seems difficult to say that the loss was directly occasioned by the misconduct of the master in illegally trading, for there would have been no loss but for the subsequent seizure and condemnation of the vessel. And in Vallejo *v.* Wheeler (*ubi supra*), it is only by a stretch of language that the loss can be said to have been proximately due to the barratrous deviation: it was proximately caused by perils of the sea. And in Cory *v.* Burr, where the facts were that the ship was seized by Spanish revenue officers in consequence of the barratrous act of the captain in smuggling, Lord Blackburn himself agrees that the loss was not proximately due to the barratry, but to the seizure. But inasmuch as on very similar facts the plaintiff in Earle *v.* Rowcroft recovered on a count for barratry, it is difficult to understand how it can fairly be said that there is no authority for the proposition that the rule as to proximate cause is less stringently applied to cases of this nature.

Sect. 859. waves, owing to drifting on the rocks, in consequence of the barratrous act of the captain in cutting her cable, this might be recovered either as a loss by perils of the seas or a loss by barratry (*i*).

So, where a ship was captured by the enemy, through a barratrous agreement between her captain and the captain of the enemy, Lord Ellenborough held, that this might be recovered either as a loss by capture or a loss by barratry (*k*).

Where goods were seized in consequence of the captain's barratrous breach of blockade, it was held that the foreign sentence by which they were condemned as enemy's property could not prevent the plaintiff from recovering as for a loss "by barratry;" for, even if the sentence were conclusive of the fact of enemy's property, still it was by the barratrous act of the captain that the goods had assumed that character (*l*).

But a foreign sentence, stating the ship to have been seized for breach of blockade, is not conclusive evidence of barratry; for the breach of blockade might have been committed by the captain in ignorance and without intention, or in obedience to his owner's orders, in which case it would be no barratry (*m*).

The doubt expressed in this case, whether the assured could recover in respect of a seizure occasioned by a barratrous breach of blockade, without a count for loss by barratry, seems answered in the affirmative by the cases of Heyman *v.* Parish and Arcangelo *v.* Thompson.

If, indeed, the loss be merely barratrous, the case would be different; thus, the assured could not recover for loss caused by a fraudulent sale, or by running away with the ship, except under a count for barratry (*n*).

(*i*) Heyman *v.* Parish (1809), 2 Camp. 149.

(*k*) Arcangelo *v.* Thompson (1811), 2 Camp. 620.

(*l*) Goldschmidt *v.* Whitmore (1811), 3 Taunt. 508.

(*m*) Everth *v.* Hannam (1815), 6 Taunt. 375; 2 Marshall, 72.

(*n*) Per Lord Ellenborough in Heyman *v.* Parish (1811), 2 Camp. 151. See also, as to this point, Walker *v.* Maitland (1821), 5 B. & Ald. 171; Blyth *v.* Shepherd (1842), 9 M. & W. 763.

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Of losses within the general clause, "all other perils, losses and misfortunes."

860. At the end of the enumeration by name of the different losses against which the underwriter undertakes to protect the assured, are added the words "and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof."

This general and sweeping clause, it is now decided, covers other cases of marine damage, of the like kind with those specially enumerated and occasioned by similar causes.

Application of the *ejusdem generis* rule.

Thus, Lord Ellenborough held in the first case, in which the effect of this clause came before the Courts for judicial determination, that, where one British ship had fired upon and sunk another, mistaking her for an enemy, this, though not a loss by perils of the seas, yet fell within the scope of the general clause, and was recoverable under a count in the declaration, specially stating the cause of loss as it really occurred (*o*).

So where dollars were thrown overboard by the master at the moment of being captured, to prevent them falling into the hands of the enemy, the Court held, that though this was not a peril of the seas, and probably not, strictly speaking, a loss by jettison, yet it clearly fell within the scope of the general clause (*p*). And where a ship, after discharging her cargo in her port of delivery, was put into a graving dock to repair, and there blown over by the wind and injured, as the ship at the time of the accident was not water-borne, nor in the ordinary course of her voyage (*q*); and again, where a ship was bilged and rendered incapable of pursuing her voyage by the accidental giving way of her tackle and supports, in the act of being moved out of a dock into which she had been put for repairs, out of the ordinary course of her voyage; the losses thus occasioned were held to be included in the general clause (*r*).

(*o*) Cullen *v.* Butler (1815), 5 M. & S. 461.

(*p*) Butler *v.* Wildman (1820), 3 B. & Ald. 398. See, too, The Knight of St. Michael, [1898] P. 30, and cases there cited, per Barnes, J.

(*q*) Phillips *v.* Barber (1821), 5 B. & Ald. 101.

(*r*) Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519. This decision is,

Sect. 860. On the same principle, where an insurance was effected on goods "at and from London by land carriage to Harwich, and thence by packet to Gottenburg:" it was held on demurrer that the loss of these goods in the course of their land carriage from London to Harwich by the fraud and negligence of the servants of the carriers was recoverable as a loss occasioned by a peril *ejusdem generis* with barratry (*s*).

The general clause, and the *ejusdem generis* rule.

861. And in Davidson *v.* Burnand (*t*), the facts being that while the steamer was loading in harbour her draught was increased by the weight of the cargo, so as to bring the discharge pipe below the surface of the water, which then flowed down the pipe and through some valves which had negligently been left open and damaged the plaintiff's goods—this was held to be covered by the general clause.

In West India Telegraph Co. *v.* Home and Colonial Ins. Co. (*u*) the Court of Appeal went beyond any previous decision, by holding that the wreck of a steamer caused by the explosion of her boiler under ordinary pressure of steam in moderate weather was within the general words. The reasons, however, assigned were different, Lord Selborne apparently thinking the loss due to a peril similar to a peril of the seas, while Brett, L. J., based his judgment on the ground that an explosion by steam was *ejusdem generis* with fire.

But in the later case of Hamilton *v.* Thames and Mersey Marine Ins. Co. (*x*), Brett, L. J. (then Lord Esher, M. R.), himself threw doubt upon this view, and it was eventually disapproved in the House of Lords. The case raised the general question as to the liability of underwriters for damage to ship's machinery. The air chamber of the donkey-engine burst, owing to water being forced up into it through a valve being

however, doubted by Lords Halsbury and Herschell in Thames & Mersey Co. *v.* Hamilton (1887), 12 App. Cas. 484.

(*s*) Boehm *v.* Combe (1813), 2 M. & S. 172.

(*t*) (1868), L. R. 4 C. P. 117.

(*u*) (1880), 6 Q. B. D. 51.

(*x*) (1886), 17 Q. B. D. 195. And, in the House of Lords, Thames & Mersey Co. *v.* Hamilton (1887), 12 App. Cas. 484.

closed which ought to have been left open, and, a claim being made by the shipowner, it was urged on his behalf that the damage was caused by a danger of navigation, and therefore by a peril similar to perils of the seas. The House of Lords, however, while accepting the principle established in Cullen *v.* Butler, held that it was impossible to say that the damage in this case was of a character to which a marine adventure is specially subject, and on this ground disallowed the claim (*y*). Sect. 861.

862. The assured, as a general principle, may recover from the underwriter in respect of any extraordinary expenditures which he has necessarily incurred in consequence of any of the perils insured against; and also in respect of all charges or contributions which, either by the law of the land or the general law maritime, are attached as a direct legal consequence to these perils. Losses not enumerated, but recoverable as the legal or necessary consequences of the perils insured against.

Thus, he is liable to the assured in respect of sums which the latter has been compelled to pay by way of general average contribution, or by way of salvage, or in reclaiming captured property, or in repairing damage done to the ship by the perils insured against, &c.

The subject of general average contribution is of too great extent, and has too important a connection with the law of Marine Insurance to be treated of incidentally in this place, and must be reserved for a separate chapter.

863. With the subject of salvage, except so far merely as it concerns the assured and the underwriters, we do not propose to deal; the whole doctrine having been discussed in several well-known treatises on shipping, to which branch of the law maritime its consideration more properly belongs. Salvage.

The liability of the underwriter for salvage depends not upon his having engaged to indemnify against it by any express words in the policy, but upon its being made by the Salvage is recoverable under no special words, but as a loss

(*y*) Cf. especially the judgment of Lord Herschell, which reviews all the earlier authorities. The result of this decision was the invention of the "Inchmaree" clause, which is now almost universally inserted in policies on steamers. Gow, 119.

Sect. 863. arising from perils insured against.

law of the land, or the general law maritime, a direct and immediate consequence of perils against which he does insure (*z*).

Hence, in order to recover salvage expenses, the assured need not, and in fact ought not, to declare for loss by the payment of salvage; but he should declare as for that species of loss which occasioned the payment of salvage—as, for loss by perils of the sea, in case of salvage from shipwreck; for loss by capture, when the salvage is a remuneration to re-captors (*a*).

Although a salvage award is a judgment *in rem*, the underwriter is not thereby estopped from showing that there was in reality no peril of the sea or other occasion for salvage services (*b*).

The suing and labouring clause. Aitchison *v.* Lohre.

864. In Aitchison *v.* Lohre (*c*), an attempt was made to recover in respect of payments made to salvors, as made not in consequence of perils of the sea, but under the suing and labouring clause, which provides that "it shall be lawful for the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of" the subject of insurance, "without prejudice to this insurance, to the charges whereof we the insurers will contribute." In a vast majority of cases it is apparent that it would make no difference under which head such payments were recoverable, provided they were in fact recoverable; but the facts of Aitchison *v.* Lohre were peculiar. It was an

(*z*) The words in the text were discussed in Nourse *v.* The Sailing Ship, &c. Assoc., [1896] 2 Q. B. 16; 1 Com. Cas. 388, in the Court of Appeal. There does, indeed, seem some ground for the argument that if they are correct, life salvage and damage payable on account of collision should be similarly recoverable under a Lloyd's policy, which they are not. If, on the other hand, they are not substantially correct, it is difficult to see exactly on what principle salvage is recoverable under a Lloyd's policy, the House of Lords having refused to allow it to be recovered under the suing and labouring clause.

(*a*) Cary *v.* King (1736), Ca. temp. Hardwicke, 304; Aitchison *v.* Lohre (1879), 4 App. Cas. 755; Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455.

(*b*) Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455.

(*c*) 1 Q. B. D. 502; 3 Q. B. D. 553; 4 App. Cas. 755.

action on a policy of insurance for 1,200*l.* on the "Crimea," in the usual form, and containing the clause above mentioned. It appeared that in the course of her voyage the vessel had sustained much damage by sea perils, so that she was become leaky and water-logged, helpless, and not navigable, and in great danger of being completely lost; in this state, therefore, those on board signalled the steamer "Texas" for assistance, which accordingly took her in tow and brought her into Queenstown. In the Queen's Bench Division such was the estimate of the damage sustained by the ship that the assured, who had elected to repair, had judgment for 100*l.* per cent., *i.e.*, for the full sum insured; and as this, in the opinion of that Court, exhausted the policy, the action was dismissed as to a further claim of 500*l.* for general average, and for salvage paid by the assured as the contribution for ship under these heads. The Court of Appeal affirmed the judgment for 100*l.* per cent., and also held that under the suing and labouring clause the assured was entitled to judgment for his further claim. In the Lords, on the motion of Lord Blackburn, the House affirmed the judgment for 100*l.* per cent., and reversed the judgment as to the further claim on the ground that general average and salvage do not come within either the words or the object of the clause. Sect. 864.

865. His Lordship, after quoting the words of the clause, continued: "The object" of the clause "was to encourage exertion on the part of the assured; not to provide an additional remedy for the recovery by the assured of indemnity for a loss which was, by the maritime law, a consequence of the peril. In some cases the agents of the assured hire persons to render services on the terms that they shall be paid for their work and labour, and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvors, who are to be paid nothing in case of failure, and a large remuneration proportional to the value of what is saved in the event of success. I do not say that such hire may not come within Object of the clause. Lord Blackburn's judgment.

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the suing and labouring clause. But that is not this case. The owners of the 'Texas' did the labour here, not as agents of the assured and being to be paid by them wages for their labour, but as salvors acting on the maritime law, which, as explained by Lord Chief Justice Eyre in Nicholson *v.* Chapman (*d*), gives them a claim against the property saved by their exertions and a lien on it, and that quite independently of whether there is an insurance or not, or whether, if there be a policy of insurance, it contains the suing and labouring clause or not. The amount of such salvage occasioned by a peril has always been recovered without dispute under an averment that there was a loss by that peril (see Cary *v.* King (*e*)); and I have not been able to find any case in which it was recovered under a count for suing and labouring" (*f*).

The fine distinction which his Lordship draws between salvors acting on the maritime law and salvors working under a special contract will be duly observed by the reader. The point established by the case is that salvage services, in order to be recoverable under the clause, must be shown to have been rendered in the particular case by the "factors, servants, or assigns" of the assured, within the strictest meaning of those words (*g*).

Effect of suing and labouring clause in a policy of re-insurance.

866. The same words were construed with similar strictness in Uzielli *v.* The Boston Marine Insurance Company (*h*). The owners of a ship insured her by an ordinary policy at Lloyd's. Lloyd's underwriters re-insured their risk with the plaintiffs, who themselves re-insured with the defendants.

(*d*) 2 H. Bl. at p. 257.

(*e*) Cas. t. Hardw. 304.

(*f*) Aitchison *v.* Lohre, *ubi supra*. Cf. also Dixon *v.* Whitworth (1879), 4 C. P. D. 371; 4 Asp. M. L. C. 11; reversed on appeal, 4 Asp. M. L. C. 327.

(*g*) For a learned criticism of this decision, see the 6th edition of this work, p. 793, and Appendix to Chap. II. Part III. The present editors, while disposed to think there is considerable force in Mr. Maclachlan's somewhat strong observations, do not see the advantage of prolonging a controversy which has been settled by the highest Court of the country.

(*h*) (1884), 15 Q. B. D. 11.

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All policies contained the usual suing and labouring clause, and both the re-insurance policies appear to have contained the ordinary clause declaring them to be re-insurances subject to the same terms, &c. as the original policies, and to pay as might be paid thereon. Damage was sustained amounting to 88 per cent., in addition to which Lloyd's underwriters incurred salvage expenses to the extent of 24 per cent., for all of which, making 112 per cent., they were reimbursed by the plaintiffs. It was held, however, by the Court of Appeal that the plaintiffs were not entitled to recover more than 100 per cent. from the defendants. The salvage expenses were recoverable only as losses due to perils of the sea. This being so, the damage of 88 per cent., together with 12 per cent. for the salvage, exhausted the policy, notwithstanding the clause "to pay as may be paid thereon, &c." To the argument that the remaining 12 per cent. for the salvage might be recovered under the suing and labouring clause the Court replied that the Lloyd's underwriters who had effected the salvage were not the factors, servants, or assigns of the re-insuring plaintiffs (*i*).

Can salvage charges be recovered as well as a total loss?

867. It is established, therefore, by these cases that where particular average damage sustained by a vessel, together with maritime salvage charges incurred by the assured, exceeds 100 per cent., the excess is not recoverable from underwriters. It is to be noticed that both cases were cases where the damage was treated as particular average only. It does not by any means follow that if the assured in the former case had chosen, or if the assured in the latter case had been able, to treat the loss as total, he would not have been entitled to recover both the salvage charges and for a total loss, on an analogous principle to that whereby an underwriter may, in certain cases, be liable both for particular average damage and for a total loss occurring in the same voyage (*k*). This point, it appears, might have arisen in a

(*i*) This decision is also severely commented upon by Mr. Maclachlan (6th ed. p. 795).

(*k*) See Livie *v.* Janson (1810), 12 East, at p. 655.

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recent case (*l*) in which the underwriters were in fact held liable for a total loss notwithstanding a previous payment of salvage charges, but the decision turned on other grounds, namely, that the salvage charges had in fact been incurred on account of the underwriters in the first instance, and not on account of the assured at all. It was held, therefore, that the underwriters who had previously paid the salvage charges —but not, as it was found, to any agent of the assured— were liable nevertheless to pay the latter for a total loss, without deduction in respect of such previous payment.

Life salvage not recoverable.

868. Prior to 1846 salvage was awarded only in respect of services rendered to ship or cargo. It had indeed been the practice of the Court of Admiralty, where lives as well as property were saved, to increase the reward payable, but in respect of the saving of life alone salvage was never awarded. It follows of course that life salvage, as such, was not recoverable from underwriters, because there was no such thing. The law on this point has not been altered by 9 & 10 Vict. c. 99, s. 19, which is now represented by sect. 544 of the Merchant Shipping Act, 1894, so that life salvage payable thereunder is not now recoverable under a Lloyd's policy in the usual form. It is a risk, however, which is sometimes specially insured against (*m*).

"Particular charges."

869. Another class of losses, which, though not specially enumerated in the policy, are nevertheless recoverable thereunder, is that which is embraced under the term "particular charges." The distinction between "particular charges" and "particular average" was first definitely established in our Courts in Kidston *v.* Empire Insurance Co. (*n*), where the

(*l*) Buchanan *v.* London, &c. Ins. Co. (1895), 65 L. J. Q. B. 92; 1 Com. Cas. 165.

(*m*) Nourse *v.* Liverpool Sailing Ship Owners' Mutual, &c. Assoc., [1896] 2 Q. B. 16 (C. A.).

(*n*) (1866), L. R. 1 C. P. 535; 2 C. P. 357. It was, indeed, noticed in an earlier case (Booth *v.* Gair (1864), 15 C. B. N. S. 291), but less definitely, as the distinction, on the facts of that case, proved immaterial. Particular charges, incurred on behalf of one interest only, are also to be distinguished from general average expenditure incurred on the

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jury, after hearing the evidence of several average-adjusters and other witnesses, found that there was in the business of marine insurance a well-known and definite meaning affixed by long usage to the term "particular average" as distinguished from the term "particular charges"—viz., that "particular average" denotes actual damage done to or loss of part of the subject-matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance; and that expenses incurred in warehousing and forwarding goods are not "particular average," but are termed "particular charges."

Particular charges are recoverable from underwriters when incurred, after the arising of a peril insured against, in order to prevent such peril causing a loss for which the underwriters would be liable, if it were so caused. In this event they are charges incurred "in and about the defence and safeguard" of the subject-matter of insurance, within the suing and labouring clause. In certain cases they may also be recoverable from underwriters, apart from the suing and labouring clause, as losses occasioned by a peril insured against when they have been necessarily incurred in consequence of such a peril—as, for example, expenses of warehousing and forwarding cargo, when a peril insured against has occasioned the necessity of such expenditure (*o*).

joint account. The difficulties sometimes experienced in maintaining this distinction are dealt with elsewhere, in the chapter on "General Average." Cf. McArthur, 173—177 (2nd ed.); Carver on Carriage, s. 398.

(*o*) These could probably also be recovered under the suing and labouring clause, at the option of the assured (see per Lord Ellenborough in Livie *v.* Janson (1810), 12 East, 655); and it is at least doubtful whether even expenses incurred in order to avert a loss—such as, for instance, those which were held in Kidston *v.* Empire Ins. Co. to be recoverable under the suing and labouring clause—could not also be recovered from underwriters as money paid on their behalf, apart from the clause. It is the captain's duty in an emergency to act on behalf of all concerned. Might not expenses incurred by him in doing so be recovered by his owners from the underwriters under an implied contract of agency or indemnity, such agency having been thrust upon them or their servant by perils insured against? Cf. Le Cheminant *v.* Pearson (1812), 4 Taunt. 367. Some such view appears to have

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Further consideration of the suing and labouring clause.

870. It is necessary to consider the suing and labouring clause in somewhat further detail, as also to notice certain decisions.

It is established, as observed above, that the clause does not come into operation except in anticipation of "any loss or misfortune" that would fall upon the insurers if it did happen. "If by perils insured against," said Brett, L. J., "the subject-matter of insurance is brought into such danger that without unusual or extraordinary labour or expense a loss will very probably fall on the underwriters, and if the assured or his servants or agents exert unusual or extraordinary labour, or if the assured is made liable to unusual or extraordinary expense in or for efforts to avert a loss, which, if it occurs, will fall on the underwriters, then each underwriter will, whether in the result there is a total or a partial loss, or no loss at all, not as part of the sum insured, but as a contribution independent of and even in addition to the whole sum insured, pay a sum bearing the same proportion to the cost or expense incurred as the sum they would have had to pay if the probable loss had occurred, or to the loss which, because the efforts have failed, has occurred, as that loss bears to the sum insured" (*p*).

The cases that established the above-mentioned limitation of the applicability of the clause are Great Indian Peninsular Railway Co. *v.* Saunders (*q*), and Booth *v.* Gair (*r*).

Great Indian Peninsular Railway Co. *v.* Saunders.

In the former case, the policy was on iron rails for Bombay "warranted free from particular average unless the ship be stranded, sunk, or burnt." The vessel was compelled by perils insured against to put into Plymouth in such a state as not to be worth repairing, but she was not stranded, sunk, or

been held in the American case of White *v.* Republic Fire Ins. Co. (1869), 57 Maine, 91. If it were so decided, the effect of the suing and labouring clause would appear to be no more than to render certain that which otherwise might have been considered doubtful.

(*p*) Per Brett, L. J., in Lohre *v.* Aitchison (1878), 3 Q. B. D. at p. 566.

(*q*) (1861), 1 B. & S. 41; 2 *ibid.* 266; 30 L. J. Q. B. 218; 31 *ibid.* 206.

(*r*) (1863), 15 C. B. N. S. 291; 33 L. J. C. P. 99.

burnt. The rails were landed and sent on by other vessels at a cost of 825*l.*, the whole of which sum, inasmuch as the original contract of carriage provided for payment of freight "ship lost or not lost," was an extra expense incurred by the shippers in consequence of the loss of the original ship. It was held that for this sum the underwriters were not liable, either under the suing or labouring clause or otherwise, on the ground that at the time when the expenditure was incurred the iron was in no peril of total loss, for which alone the underwriters were responsible. Sect. 870.

In Booth *v.* Gair (*s*), bacon was insured on a voyage from New York to Liverpool "free from average, unless general, or the ship be stranded, sunk, or burnt," with the suing and labouring clause in ordinary form. The vessel became a constructive total loss, owing to perils of the sea, but without being stranded, sunk, or burnt; there was a partial, but no total loss of the bacon, which was landed at Bermuda and part sent on to Liverpool. No expenses appear to have been incurred in saving the goods from a total loss (*t*); but certain expenses were incurred by way of warehousing, coopering, reshipment, &c. It was held, in accordance with the decision in the case last cited, that inasmuch as these expenses were

(*s*) *Ubi supra.*

(*t*) This sentence is taken from the *résumé* of the case by Willes, J., in L. R. 1 C. P. at p. 549. But this does not seem to have been admitted by the plaintiff, on whose behalf it was expressly contended that, had the cargo not been forwarded at once, it would have been in danger of perishing (see 33 L. J. C. P. at p. 100), and that the difference in the character of the cargo distinguished the case from that of Gt. Indian Co. *v.* Saunders. Mr. McArthur (p. 267, 2nd ed.) on this ground thinks this decision wrong. It may be that the Court came to a questionable conclusion on the facts, but the principle on which the decision purports to be based is unexceptionable. Cf. also The Pomeranian, [1895] P. 349. It is possible, indeed, that Mr. McArthur's criticism only errs in not going far enough. There is a total loss under a policy on goods, not only in case of physical damage, but also in the event of the failure of the goods to arrive at their destination. See *post*, s. 1142. Forwarding expenses, therefore, necessitated by perils insured against, appear to be incurred to avert a loss which would fall on the policy, whether the goods be such as to be liable to deterioration by delay or otherwise, or not. According to this view, it is difficult to see how either of these decisions can be supported.

Sect. 870. not incurred in order to avoid any risk of a total loss, the underwriters were not liable.

Expenses incurred in order to avert a loss for which, if it had happened, underwriters would have been liable.

871. These cases were followed in 1866 by Kidston *v.* The Empire Marine Ins. Co. Limited (*u*), which established the point which had hitherto been left open, viz., that where the expenses are incurred in order to avert a loss for which, if it had happened, the underwriter would have been liable, then such expenses are recoverable under the suing and labouring clause. The action was brought on a policy on chartered freight, containing the usual suing and labouring clause and the warranty against particular average. The vessel became a constructive total loss, and the cargo, after being landed and warehoused at Rio, was forwarded to its destination by another vessel for an agreed freight of 2,467*l.*, which the plaintiffs paid, ultimately receiving from the owners of the cargo the full charter freight. It was held by the Court of Common Pleas and the Exchequer Chamber that inasmuch as the 2,467*l.*, together with the landing and warehousing expenses, had been paid with the object of averting the total loss of freight which would otherwise have been suffered, and for which the underwriters would have been liable, these amounts were recoverable under the suing and labouring clause, notwithstanding the warranty against particular average.

The result in this last case showed that there had been no loss whatsoever on the subject of insurance; the full freight was earned and received. That was the proper effect of the clause. Prevention of loss is the very object in view. It contemplates the benefit of the insurers only, and the insurers on that account undertake for the expenditure. Cases therefore do frequently occur in which the insurers by the operation of this clause are saved from loss, and the damage done is thrown upon the assured (*x*). For instance, under a policy

(*u*) (1866), L. R. 1 C. P. 535; Ex. Ch. 2 C. P. 357.

(*x*) Per Willes, J., in Kidston *v.* Empire Ins. Co. (1866), L. R. 1 C. P. 543, 544.

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on goods warranted free from average under 5 per cent., the goods, suppose, have been wetted by sea water; the damage to them, unless they are taken out and dried, would go on increasing beyond the 5 per cent., till it threatened the cargo with destruction; but they are dried at an expense of 3, 2, or 1 per cent., and the damage done is less than 5 per cent. The insurers bear the cost of drying, and the assured the loss by sea damage (*y*).

By this clause the insurers undertake an additional liability over and above the insurance, properly so called, and quite of a different nature (*z*). It follows that "particular charges" cannot be added to the "particular average," or damage done to the subject of insurance, so as to increase the amount of the latter to three or five per cent., and so avoid the effect of the memorandum.

Other decisions on the suing and labouring clause.

Costs of resisting claim for which underwriters would have been liable to indemnify.

872. The independent character of the clause formed one of the grounds of the decision in Xenos *v.* Fox (*a*). In this case the plaintiffs were the owners of the "Smyrna," and had been sued for running down another vessel. This action they successfully defended, but were put to costs. Their policy, in addition to the suing and labouring clause, contained a collision clause entitling them to recover from their underwriters a certain proportion of any damages which they might have to pay by reason of their vessel accidentally or negligently damaging any other vessel. Relying on the suing and labouring clause, they attempted to get from their underwriters the costs incurred in their successful defence of the action brought against them, on the ground that, had they not been incurred, there would have been a good claim against the underwriters on the collision clause. The Court of Common Pleas, however, decided against this somewhat ingenious claim, mainly on the ground that the suing and labouring clause was an engagement of limited application,

(*y*) Per Willes, J., L. R. 1 C. P. 544.

(*z*) Cf. Lohre *v.* Aitchison (1878), 3 Q. B. D. at p. 567, per Brett, L. J.

(*a*) (1868), L. R. 3 C. P. 630; 4 C. P. 665.

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extending only to the ordinary insurance perils, and not to those specially covered by the collision clause. The Exchequer Chamber appear to have concurred in this view, and also to have considered that no "loss or misfortune" contemplated by the clause had ever arisen.

Expenses to avoid further deterioration of cargo.

873. Meyer *v.* Ralli (*b*) affords a good illustration of the principles established by the previous decisions. A cargo of rye was insured by a policy warranted free of particular average. The voyage was necessarily abandoned, owing to perils of the sea; part of the rye was so damaged that it had to be sold at once, the rest could have been profitably re-conditioned and forwarded to its destination. This course, however, the captain neglected to take, so that a substantial portion remained in warehouses for more than a year, subject to charges. It was held that the plaintiffs, under the suing and labouring clause, were entitled to recover the expenses of unshipping the whole and conveying it to a warehouse, and of the separation of the comparatively sound part from that which was irreparably damaged, and of the expense of reconditioning the former—all these being expenses necessary in order to avert a total loss—but for no other expenses were the underwriters responsible.

Under a policy on live cattle against all risks, including mortality from any cause whatsoever, the insurers were held liable, under the clause, for the cost of extra fodder supplied whilst the vessel was detained in a port of refuge for repairs necessitated by perils of the sea, inasmuch as if the animals had perished for want of it, there would have been a valid claim for loss by mortality (*c*).

Only reasonable expenses recoverable.

874. It need hardly be said that only such expenditure can be recovered under the clause as can be shown to have been reasonably necessary.

A ship with a cargo of palm oil for Liverpool stranded on

(*b*) (1876), 1 C. P. D. 358.
(*c*) The Pomeranian, [1895] P. 349, per Gorell Barnes, J.

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the Welsh coast near Pwllheli, and it became necessary to land her cargo. She was then towed to Carnarvon, and there made seaworthy for the rest of the voyage. Meanwhile, the shipowner had sent the cargo overland by rail to Liverpool at an expense of over 200*l.*, and thereby earned his freight. In an action on his policy on freight to recover this expenditure, it was held that, although the occasion and purpose justified some expenditure, namely, to prevent a total loss of the freight, yet, as he might have retained the oil till his ship was repaired, and have reshipped it at an expense of 70*l.*, he was entitled to recover 70*l.* and no more (*d*).

It is not considered necessary further to enumerate cases in which particular charges may be recovered under the suing and labouring clause. Sufficient has been said by way of illustration of such principles as are peculiar to the construction of the clause. Subject to such principles, claims under the clause are dealt with as claims made in respect of perils directly insured against. This subject is dealt with in other parts of this work.

Other expenses recoverable under policy on ship.

875. Apart, however, from the suing and labouring clause, other expenditures and disbursements incurred in the course of the voyage in consequence of extraordinary casualties, for the benefit not of the whole adventure, but of the ship alone, are recoverable by the assured from the underwriter, either under a special count, or, generally, as a consequence of some peril insured against.

Expenditures for the necessary repairs of ship.

Thus, actual disbursements necessarily made in a port of distress, or elsewhere, for repairing damage done to the ship in the course of the voyage, by the violent operation of the perils insured against, are recoverable from the underwriter upon an averment of loss by those perils (*e*). The cost of such repairs includes the cost of replacing coals and engine-

(*d*) Lee *v.* Southern Ins. Co. (1870), L. R. 5 C. P. 397.

(*e*) See per Lord Ellenborough in Livie *v.* Janson (1810), 12 East, at p. 655. His Lordship also suggests that such expenditures, especially when followed by a total loss, might more properly be claimed independently under the suing and labouring clause.

Sect. 875. room stores consumed in repairing a steamer, or in working her engines or winches to assist in such repairs, or in moving her to a place of repair within the limits of the port where she is lying (*f*). None of these repairs, however, must be such as are properly attributable to the ordinary wear and tear of the voyage, for which, as we have already seen, underwriters are not responsible.

In calculating, however, the amount for which the underwriter is liable in respect of repairs, a deduction is in most cases made of one-third of the value of the new work which replaces the old. Upon the subject of this deduction, generally known in insurance law by the term of "one-third new for old," we shall have more to say in treating of the adjustment of particular average losses.

Expenses of endeavouring to procure restoration of captured ship, fall on the underwriter.

876. Besides the cost of necessary repairs, there are other expenditures which may be recoverable from the underwriter. Thus, as capture or hostile seizure, *primâ facie*, dissolves the contract of affreightment, or at all events suspends it for a time (*g*), the wages, provisions and other expenses of the master and crew in endeavouring to procure a restoration of the captured ship or the detained cargo, such expenses not being comprised within those ordinary services of the voyage which are payable out of the freight, give the assured a claim either against the underwriter on ship or on cargo, according as the ship alone or the cargo alone is the sole cause of seizure and detention. Where the services of the master and crew are thus given for the joint benefit of both ship and cargo, as they are when both are the subject of detention, the expense should be borne by both (*h*).

Expenses incurred during detention by embargo, are not a charge

But an embargo, detention, or arrest of princes, does not thus work a dissolution of the contract of affreightment, nor even suspend it, however long it may last; such a casualty,

(*f*) There is an express rule of the Association of Average Adjusters to this effect. See Appendix.

(*g*) The Hiram (1800), 3 C. Rob. 180; Liddard *v.* Lopes (1809), 10 East, 526.

(*h*) Arnould (2nd ed. p. 870) said this was a case for general average contribution; but this is doubtful.

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in fact, leaves the relative rights of the parties wholly untouched (*i*) : the shipowner, therefore, owes all the services of his crew during this period to the freighter, and their wages and provisions during the detention are a charge upon the freight, an ordinary expense of the voyage, which the shipowner, if insured, cannot recover against his underwriters (*k*).

on the underwriters, nor during delay for repairs.

Upon the same principle it is that the wages and provisions of the crew during the ship's detention in a port of distress for repairs are not recoverable from the underwriter as an average loss, but must be borne by the shipowner as one of the necessary expenses of earning freight (*l*).

The principle of all these cases is thus shortly and clearly expressed by Benecke: "The owner owes the services of the crew to the freighter and to the ship herself during the whole voyage, and consequently also during the time of repairs or detention, which forms part of the voyage, and he cannot call upon the underwriter for expenses which are foreign to his (the underwriter's) contract" (*m*).

Principle of the cases.

877. As to goods, the underwriter thereon is not responsible, under the common form of policy, for loss the merchant may incur by having to pay the same freight on sea-damaged goods arriving in bulk at their port of destination, as he would have had to pay had they arrived there sound (*n*). Nor can he be charged with *pro ratâ* freight which the merchant may have had to pay the shipowners (after capture of ship and cargo and subsequent restitution of the proceeds of the goods) in respect of that part of the voyage performed before the capture (*o*).

Losses on goods. Underwriter not liable for merchant's loss in having to pay full freight on damaged goods arriving in bulk. Or *pro ratâ* freight.

(*i*) Hadley *v.* Clarke (1799), 8 T. R. 259.

(*k*) As to ship, see Eden *v.* Poole (1785), 1 Park, Ins. 117; Robertson *v.* Ewer (1786), 1 T. R. 127. As to freight, see Sharp *v.* Gladstone (1805), 7 East, 33; Everth *v.* Smith (1814), 2 M. & S. 278.

(*l*) Lateward *v.* Curling (1776), 1 Park, Ins. 288; Fletcher *v.* Poole (1769), *ibid.* 115.

(*m*) Benecke, Pr. of Indem. 463. These cases have, however, been otherwise explained. See Field SS. Co. *v.* Burr, [1898] 1 Q. B. 821; [1899] 1 Q. B. 579 (C. A.).

(*n*) Baillie *v.* Moudigliani (1785), 1 Park, 117; 1 Phillips, s. 1140.

(*o*) Baillie *v.* Moudigliani (1785), 1 Park, 116; Abbott on Shipping,

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Loss on sale of goods to repair ship.

Where goods are necessarily sold by the master in a port of distress to defray the expenses of repairing the ship, the loss sustained from the sale by the shipper of the goods may be recovered by him against the owner of the ship, but cannot be claimed as an average loss from the underwriter on goods (*p*).

Expenses of damaged sales.

The expenses incident to the sale by auction of sea-damaged goods are, as we shall see in treating of adjustment, added to the average loss payable by the underwriters on goods (*q*).

Partial losses on freight.

878. As Stevens remarks, the word "average" is very inapplicable to claims for partial losses on freight, which, in fact, can only arise from one cause, viz., a total loss on part of freight (*r*).

It seems in this country that a claim in respect of partial loss on freight can only be made good when either, 1st, only part of the full intended cargo out of which the freight was expected to arise was on board, or contracted for at the time of loss (*s*); 2nd, when some separable part of the whole cargo (*i.e.*, separately valued or insured by the policy (*t*)) goes in bulk to the bottom of the sea, or is otherwise totally destroyed by a peril insured against (*u*). In both these cases there is a clear total loss of part, or partial loss, of freight, which must be adjusted by the underwriter in the mode hereafter to be indicated.

A third case, it seems, may arise. If a ship, with a full cargo on board, is so damaged that she can only be so far repaired at the port of distress as to take on part of the cargo,

691, 13th ed. See also per Story, J., as cited 1 Phillips, s. 1138. Phillips himself takes a different view.

(*p*) Dowell *v.* Gudgeon (1816), 5 M. & S. 431; Sarquy *v.* Hobson (1829), 2 B. & Ad. 7; 3 Dowl. & Ry. 189; S. C., 4 Bing. 131; 12 Moore, 474; Duncan *v.* Benson (1847), 1 Exch. 537; Benson *v.* Duncan (1849), 3 Exch. 644; 1 Phillips, s. 1139.

(*q*) See *post*, s. 1013.

(*r*) Stevens, Av. 174; Brocklebank *v.* Sugrue (1831), 1 Moo. & Rob. 102.

(*s*) Forbes *v.* Aspinall (1811), 13 East, 323; Forbes *v.* Cowie (1808), 1 Camp. 520.

(*t*) Ralli *v.* Janson (1856) (in error), 6 E. & B. 422; 25 L. J. Q. B. 300.

(*u*) See The Merchant Shipping Co. *v.* Armitage (1873), L. R. 9 Q. B. 99 (Ex. Ch.); Stevens, Av. 174.

and the residue is thereupon necessarily and justifiably sold, it has been intimated that there may be a total loss on that part of the freight which the ship is thus incapacitated from earning (*x*). Sect. 878.

879. In the following case, however, it was decided that, where the ship can be so repaired as to take on all the cargo, even a justifiable sale by the master of part of the cargo at an intermediate port, whereby the freight of such part was lost to the shipowners, did not give them a claim against the underwriters on freight, as the loss was not due to any peril insured against. Loss of freight on part of cargo, justifiably sold by master, is not an average on the underwriters on freight. Mordy *v.* Jones.

A ship, the freight of which was insured for a voyage "from Kingston, in Jamaica, to Liverpool," sailed from Kingston with a full cargo of cotton, coffee, and other colonial produce; but soon afterwards, from the starting of a plank in violent weather, was forced to put back, and, for the purposes of repair, to unload the whole of her cargo. After the ship was repaired it was found that part of the cargo had been so wetted by sea water, in consequence of the starting of the plank, that it could not be re-shipped without danger from ignition to the ship and the rest of the cargo, except after a process of washing with fresh water and drying in the sun, which would have detained the vessel six weeks, and been attended with expense equal to the freight. Under these circumstances, the master, acting as a prudent man would, if uninsured, sold the damaged goods, with the approval of the shippers (who, however, refused to interfere); and, finding he could not obtain other goods to complete his cargo in reasonable time, and being pressed by the shippers of the rest to proceed, he sailed for Liverpool with the net proceeds of the damaged goods, which he paid over to the parties interested, without retaining freight. The shipowner claimed from the underwriters a total loss of freight on the goods so sold. The Court of King's Bench held that the underwriter on freight was not

(*x*) Per Maule, J., in Moss *v.* Smith (1845), 9 C. B. 104.

Sect. 879. liable, because the loss was due rather to the prudent conduct of the captain than to any peril insured against (*y*).

Another case in which the conduct of the captain, or of his owners, was held to be the cause of a loss of freight, rather than any peril insured against, was very recently decided in the Court of Appeal. The owners of the SS. "Ramleh" chartered her for a lump sum of 3,000*l.* for a voyage from the River Plate to Liverpool, and effected an insurance on "3,000*l.* freight chartered, or as if chartered, &c." There was a cesser clause in the charter-party providing that the charterer's liability should cease upon shipment of the cargo, but that the vessel should have a lien thereon for all freight. The captain signed bills of lading, by which the goods mentioned in each bill of lading were made deliverable to the consignees thereof upon payment only of the bill of lading freight in respect of those goods; so that there was no general lien for the whole of the lump freight. Part of the cargo was lost by a peril of the sea, owing to the loss whereof the amount of the bills of lading freight received by the plaintiffs upon the cargo delivered was less than that of the chartered freight by 645*l.* It was held that such loss was not due to the peril of the sea, but to the fact that the form in which the plaintiffs had taken the bills of lading had not preserved to them their lien over the whole cargo for the chartered freight (*z*).

Loss where only *pro ratâ* freight earned.

Where only freight *pro ratâ* is earned, the loss on freight in the United States is adjusted as a salvage loss, *i.e.*, the

(*y*) Mordy *v.* Jones (1825), 4 B. & Cr. 394; 6 D. & Ryl. 479. The Court appears to have been influenced by the mischief that might arise if by a contrary decision they were to hold out a temptation to masters to sail away instead of stopping until the goods could be re-shipped. Arnould (2nd ed. p. 978) and Phillips (vol. i. s. 1142), conceiving such considerations to be the *ratio decidendi* of the case, have disputed the decision itself; but Mr. Maclachlan (6th ed. p. 803) gives the true explanation, and cites Moss *v.* Smith (1845), 9 C. B. 94; and Philpott *v.* Swann (1861), 11 C. B. N. S. 270; 30 L. J. C. P. 358, in confirmation of his view, and also as decisions to a similar effect.

(*z*) Brankelow SS. Co. *v.* Canton Ins. Office, [1899] 2 Q. B. 178 (C. A.); at present under appeal to the House of Lords.

underwriter pays the whole amount of the insurance, deducting the *pro ratâ* freight (*a*). Sect. 879.

880. When a ship has put into a port of distress for repairs, and to that end the cargo is obliged to be unloaded, the charges of unshipping and re-shipping the cargo will fall upon different persons according to circumstances (*b*). Where a ship was detained, and her homeward cargo unloaded, under embargo of the foreign government in whose port she was preparing for her homeward voyage, it was held that the expenses of re-shipping this cargo, after the embargo was taken off, whereby she was ultimately enabled to earn freight, ought to be deducted from the freight earned before paying it over to the underwriters on freight who had paid for a total loss (*c*). The charges of wages and provisions, however, incident to such detention or to a delay for repairs, seem to be no more chargeable on the underwriter on freight than on the underwriter on ship, and for the same reason (*d*). Expenses of re-shipping and forwarding cargo. Wages and provisions during detention.

It has been decided in this country, that if a ship ultimately earn freight, though not that intended for her, the expenses of a delay or detention in the course of the voyage, by reason of some of the perils insured against, as for repairs, by being icebound, &c., do not constitute a claim for an average loss against the underwriters on freight (*e*) : but the expenses of putting such substituted cargo on board at a port of distress, are to be deducted from the freight paid over as salvage to the underwriters on freight who have adjusted as for a total loss (*f*). Freight on substituted cargo.

(*a*) Coolidge *v.* Gloucester Mar. Ins. Co. (1819), 15 Mass. R. 341; 2 Phillips, s. 1440. But see Price *v.* Maritime Ins. Co. (1900), 5 Com. Cas. 332, affirmed by C. A. on 7th June, 1901, where the insurance was by a pledgee.

(*b*) See chapter on "General Average."

(*c*) Sharp *v.* Gladstone (1805), 7 East, 24. In this case, however, there had been an abandonment.

(*d*) The contrary was supposed to have been intimated by Buller, J., in Eden *v.* Poole, as reported by Park on Insurance; but the report was found incorrect by Mr. East, as stated by him in a note to Sharp *v.* Gladstone (1805), 7 East, at p. 32. See also Everth *v.* Smith (1814), 2 M. & S. 278.

(*e*) Brockelbank *v.* Sugrue (1831), 1 Mod. & Rob. 102. See *S. P.*, as to salvage, loss of freight, Everth *v.* Smith (1814), 2 M. & S. 278.

(*f*) Barclay *v.* Stirling (1816), 5 M. & S. 6. See Sharp *v.* Gladstone (1805), 7 East, 24.

Sect. 880. Whether it is the duty of the master, in case of damage to the cargo, to incur expense in drying it or otherwise restoring it to a transportable condition, must depend on circumstances: wherever these are such as to justify the master in what he has done the underwriters ought, on principle, to be bound by his proceedings (*g*).

Extra charges caused by transhipment of goods where original ship is disabled.

881. Where the original ship is lost or disabled, and the goods are sent on by the master in a substituted ship, for the benefit of the owner of the goods, the extra expenses of transhipment, beyond the cost of the original freight, may perhaps be thrown on the underwriters on the goods; if, however, they were sent on for the sole purpose of earning freight, these expenses should, on principle, be borne by the underwriter on freight (*h*). If the expenses were incurred for the common benefit of both cargo and freight, both should be charged therewith (*i*).

Partial loss on profits.

With regard to profits, it has been held in the United States, that when the goods, out of which the profits are to arise, arrive sea-damaged, or a part of them is totally lost, this is *pro tanto* a partial loss on the profits, and to be adjusted accordingly (*k*); and the same has been there held where part of the goods have been necessarily sold (*l*).

(*g*) 2 Phillips, Ins. s. 1452; Notara *v.* Henderson (1870), L. R. 5 Q. B. 346; 7 Q. B. 225.

(*h*) Kidston *v.* Empire Ins. Co. (1866), L. R. 1 C. P. 535; 2 C. P. 357. So in the United States, Saltus *v.* Ocean Ins. Co. (1815), 12 Johnson, R. 107; Schieffelin *v.* New York Ins. Co. (1812), 9 *ibid.* 21; 2 Phillips, Ins. s. 1438.

(*i*) Rose *v.* Bank of Australasia, [1894] App. Cas. 687.

(*k*) Loomis *v.* Shaw (1800), 2 Johnson, Cas. 36.

(*l*) Waln *v.* Thompson (1812), 9 Serg. & Rawle, 115.

CHAPTER III.

EXCEPTED RISKS AND LOSSES.

	SECT.
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882. BEFORE proceeding to consider more at large the subjects of general and particular average, total and partial losses, and the doctrine of adjustment, we will advert to certain risks and losses which are excepted from the policy either by the common memorandum, or by other express stipulations of less frequent occurrence.

Of the common memorandum.

Amongst the commodities which are the subjects of marine insurance, it is obvious that there are many which are liable to be deteriorated in a much greater degree than others by the effect of the perils insured against, *e.g.*, the same quantity of sea water will damage one article 50 per cent., and another only 10 per cent.; a month's delay will hardly affect one description of goods, and may entirely spoil another.

Reasons for its introduction.

There are, also, many articles of a perishable nature with regard to which it is very difficult to discover how far their deterioration is owing to the direct operation of the perils of the seas, for which the underwriter would, *primâ facie*, be liable, and how far to that inherent decay and internal decomposition, for the effect of which he is not responsible.

In order to avoid the difficulty of adjusting the rate of premium on such commodities to the risk incurred on them,

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and to escape being harassed with claims for partial losses alleged to have arisen from the perils insured against, but which may really be owing in great part to the inherent vice of the commodity itself, the underwriters in almost all countries where the practice of marine insurance prevails, have introduced clauses into the policy by which they stipulate that upon certain enumerated articles of the most perishable nature, and of very frequent import and export, they will not be liable for any amount of sea damage (average) short of total loss; upon others less perishable, that they will not be liable unless the damage amounts to a certain percentage on their prime cost or value in the policy (*a*).

The policies of all states contain similar clauses.

The policies of all mercantile states contain stipulations, introduced with this object, which vary greatly both in respect of the articles enumerated and the amount of percentage at which the liability of the underwriter commences. The stipulation in use in this country (which was first introduced about the year 1749 (*b*)), is generally called the common memorandum, and the articles enumerated in it are called memorandum articles. In a Lloyd's policy it is in the following form :—

Form of the common memorandum in use at Lloyd's.

> Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under 5*l.* per cent.; and all other goods, also the ship (*c*) and freight, are warranted free from average under 3*l.* per cent., unless general, or the ship is stranded (*d*).

(*a*) See the judgment of Lord Alvanley in Dyson *v.* Rowcroft (1803), 3 B. & P. 476; Benecke, Pr. of Indem. 464, 465; Stevens, Av. 219; 4 Boulay-Paty, Droit Mar. 87.

(*b*) 1 Magens, 10. See also Boyfield *v.* Brown (1737), 2 Str. 1065.

(*c*) The "Jansen" Clause (see Owen's Clauses, 3rd ed. p. 125) throws the initial 3*l.* per cent., in the case of particular average on ship, on the owners, who are further made to agree to remain uninsured for such 3*l.* per cent. on the whole value of the vessel. The clause applies whether or not the ship be stranded, sunk, or burnt.

(*d*) The words "sunk or burnt"

Sect. 883.

Construction of the common memorandum.

1. What articles are included.

883. The language of this stipulation is evidently very ambiguous, and a great variety of questions have arisen as to its construction. The first question is, what is included under the words by which the enumerated articles are described in the first and second clauses? As to this it has been decided in this country that the word corn includes malt (*e*), peas and beans (*f*), but not rice (*g*); and that the word salt does not include saltpetre (*h*).

In the United States it has been decided that hides and skins do not include furs (*i*), and that the specification of one description of an enumerated article, as dried fish, excludes all other descriptions of the same, as pickled fish (*j*); so, also, where the word roots was among the enumerated articles, it was held not to include sarsaparilla, because not liable to decay by sea damage (*k*).

2. Meaning of the words "warranted free from average."

884. The next question is as to the meaning of the words "warranted free from average;" the ambiguity here chiefly arises from the use of the word average (*kk*), as to the various meanings of which we shall have more to say elsewhere. As here used it means partial loss by perils insured against, and the purport therefore of the words "warranted free from average," is that the underwriter, as to the articles firstly

have within recent years been frequently added (see The Glenlivet, [1893] P. at p. 168); also words extending the liability of the underwriter in case of collision. The Institute Clauses are noticed *infra*, and will be found in the Appendix. The punctuation of the memorandum varies, and in many of its forms is open to criticism. It is clearly the intention of all parties that the exception "unless general, &c." shall apply not only to the 3*l.* per cent., but also to the 5*l.* per cent. articles. There should obviously be a comma, and not a semicolon, after "5*l.* per cent.," and a comma after "3*l.* per cent."

(*e*) Moody *v.* Surridge (1794), 2 Esp. 633.

(*f*) Mason *v.* Skurray (1780), 1 Marshall, Ins. 225; 1 Park, 245, 253.

(*g*) Scott *v.* Bourdillon (1806), 2 B. & P. N. R. 213.

(*h*) Journu *v.* Bourdieu (1787), 1 Marshall, Ins. 224; 1 Park, 245.

(*i*) Astor *v.* Union Ins. Co. (1827), 7 Cowen, R. 202; Bakewell *v.* United Ins. Co. (1801), 2 Johns. Cas. 246; Phillips, s. 1764.

(*j*) Baker *v.* Ludlow (1801), 2 Johns. Cas. 289; Phillips, s. 1764.

(*k*) Coit *v.* Colonial Ins. Co. (1811), 7 Johns. R. 385.

(*kk*) For a learned discussion as to the origin and meaning of this word, see 6th ed. of this work, pp. 919—926.

Sect. 884. enumerated, stipulates to be free from liability for any extent of deterioration which does not amount to a total loss. And as to the articles subsequently enumerated, he makes the same stipulation as to all damage which does not amount to 5 per cent. or 3 per cent. of their prime cost, or insured value; it being understood in both cases that, if the loss do amount to the agreed percentage, he engages to pay the full amount (*l*).

In point of fact, therefore, an insurance upon the articles warranted free from average in clause (1), is equivalent to an insurance against their total loss only, actual or constructive (*m*).

3. Meaning of the words "unless general."

885. The next question is as to the meaning of the words "unless general." It was on one occasion contended, that these words amounted to a condition that if a general average loss took place, then the underwriters were liable for partial loss also; but this, as might have been expected, was held not to be so, and it was decided that the true construction of the words "warranted free from average unless general" was that the underwriter is exempted by the memorandum from liability for anything less than a total loss, except it be of the nature of general average; but that for general average losses he is in all cases liable (*n*). And the warranty against particular average does not preclude an assured who has incurred expenses in order to prevent a total loss, from recovering the amount thereof, as particular charges, under the sue and labour clause (*o*).

4. Meaning of the words "or the ship be stranded." To give effect to these words it need not be shown that

886. Next, as to the words "or the ship be stranded," it has been decided that if the ship be stranded, the underwriters are liable for partial losses, though the damage or deterioration in respect of which the claim is made be shown to have proceeded, not from the stranding itself, but from

(*l*) Per Lord Alvanley in Dyson *v.* Rowcroft (1803), 3 B. & P. 476.

(*m*) Adams *v.* McKenzie (1863), 32 L. J. C. P. 92.

(*n*) Wilson *v.* Smith (1764), 3 Burr. 1550; Price *v.* The A1 Ships Small Damage Assoc. (1889), 22 Q. B. D. 580.

(*o*) Kidston *v.* Empire Marine Ins. Co. (1866), L. R. 1 C. P. 535; 2 C. P. 357.

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the loss arose from the stranding.

some other peril; thus, in the leading case of Burnett *v.* Kensington, the facts were, that the ship, having sprung a leak by striking on a rock, was making so much water, that the captain, for the general safety, was obliged to run her on shore;—the cargo, which was fruit, "warranted free of average," was greatly damaged, but it was expressly found that the whole damage was caused by the leak, and none by the subsequent stranding—the Court, after two arguments and the most mature deliberation, held the underwriters liable for the average loss on the cargo, notwithstanding the memorandum (*p*). The reason that mainly influenced the Court in their decision was that, by determining that the assured could only recover for loss occasioned by the stranding, they would let in all the doubt and difficulty as to the causes of the loss, which the introduction of the exception "unless stranded" into the memorandum was intended to remove (*q*).

Though the stranding take place in one part of the voyage, and the average loss in another, still the underwriter is liable.

In this case of Burnett *v.* Kensington, it will be observed that the stranding, though subsequent in point of time, was yet in some degree connected with, in fact was necessitated by, the very peril that caused the damage to the cargo: it has been made a question in the United States, whether the underwriter is liable, if the stranding take place in one part of the voyage, and the cargo be not damaged until a subsequent part of it, by a cause wholly unconnected with the stranding (*r*).

(*p*) Burnett *v.* Kensington (1797), 7 T. R. 210; confirming Cantillon *v.* London Ass. Co. (1764), cited 3 Burr. 1553, and Browning *v.* Elmslie (1797), cited 7 T. R. 215, and 4 T. R. 783, and overruling, as to this point, Wilson *v.* Smith (1764), 3 Burr. 1550. In America, see London Assurance *v.* Companhia de Moagens (1897), 167 U. S. 149.

(*q*) See per Grose, J., 7 T. R. 224; and cf. Nesbitt *v.* Lushington (1792), 4 T. R. 783; and Thames, &c. Ins. Co. *v.* Pitts, [1893] 1 Q. B. 476. The Institute Clauses provide as follows:—"Warranted free from particular average under 3 per cent., but nevertheless when the vessel shall have been stranded, sunk, on fire, or in collision with any other ship or vessel, underwriters to pay the damage occasioned thereby." It is submitted that where these clauses are attached to the policy (which also contains the common memorandum), effect would be given to the final words by limiting the underwriters' liability in accordance therewith, notwithstanding the decision in Burnett *v.* Kensington.

(*r*) 2 Phillips, Ins. s. 1761.

Sect. 886. This, however, is a point on which it is apprehended that no doubt can be entertained in English law, it being distinctly admitted by Grose, J., as a consequence clearly following from the decision of the Court in Burnett *v.* Kensington, "that, if a ship be stranded and the cargo suffers no damage whatever, and afterwards the ship meets with bad weather, and the cargo sustains an average loss of 90 per cent., the underwriters are answerable for the whole of that average loss," though no part may have happened in consequence of the previous stranding (*s*).

Provided the goods be still at risk, and on board the ship.

887. Where, however, the stranding takes place after the memorandum articles have ceased to be at risk (as where they were landed and sold at Rio in the course of the voyage, and the stranding took place off Bordeaux, the port of destination), this does not render the underwriter liable for an average loss sustained by them in the course of the voyage, for the stranding contemplated by the memorandum must be one which takes place after the adventure on the memorandum articles has commenced, and before it has terminated (*t*). Moreover, the goods must be on board the ship at the time of the stranding (*u*).

Stranding of a lighter is not within the exception.

It has also been decided, that the words "or the ship be stranded" are exclusively confined to the stranding of the ship, and that the stranding of a lighter, in which goods are being conveyed from the ship to shore, is not within the exception (*x*).

The meaning of the memorandum, therefore, is—

1. That all losses, in the nature of general average, are to

(*s*) Per Grose, J., in Burnett *v.* Kensington (1797), 7 T. R. 223, 224.

(*t*) Roux *v.* Salvador (1835), 1 Bing. N. C. 536; 3 *ibid.* 276; Thames, &c. Ins. Co. *v.* Pitts, [1893] 1 Q. B. 476; The Alsace Lorraine, [1893] P. 209.

(*u*) Thames, &c. *v.* Pitts; The Alsace Lorraine, *ubi supra*.

(*x*) Hoffman *v.* Marshall (1835), 2 Bing. N. C. 383; 2 Scott, 504. This contingency, however, may be expressly provided for, as in Thames, &c. *v.* Pitts, *ubi supra*, where the words were "unless the ship or craft should be stranded, &c.;" as to the effect of which words, see per Day, J., at p. 486.

Sect. 887.

be paid by the underwriter as though the policy did not contain the memorandum:

2. That the underwriter is liable for no particular average losses, or for none under the rates specified, unless the ship be stranded:

3. But that if the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist.

It is obviously, therefore, of great importance to ascertain when a ship is considered "to be stranded" within the meaning of the memorandum.

What is a stranding within the memorandum.

888. The term "stranding" is very badly chosen, and has given rise to a variety of decisions which, in the language of Lord Ellenborough, "display a curiosity not at all creditable to the law" (*y*).

The following appear to be the principal points determined as to what constitutes a stranding within the meaning of the memorandum:—

There must be a settling of the ship for a time, as distinct from a mere "touch and go."

If, as Lord Ellenborough says (*z*), "it be merely touch and go" with the ship,—if, that is, she merely touches on the obstructing object (whether rock, bank, reef, or of whatever other nature) without remaining fixed upon it for some space of time, that will not constitute a stranding; if, on the other hand, she settles down on it in a quiescent state, it will (*a*). The amount of damage sustained by the ship has nothing to do with the question of stranding or no stranding (*b*).

On piles in river bed.

Thus, where a ship ran aground on some piles, placed in a river bed about nine yards from the shore, in order to keep up

(*y*) Per Lord Ellenborough in M'Dougle *v.* Royal Exch. Ass. Co. (1816), 4 Camp. 284; 4 M. & S. 503.

(*z*) 4 Camp. 283.

(*a*) Dobson *v.* Bolton (1799), 1 Park, Ins. 239; 1 Marshall, Ins. 231; Harman *v.* Vaux (1813), 3 Camp. 429; Baker *v.* Towry (1816), 1 Stark. 436; M'Dougle *v.* Royal Exch. Ass. Co. (1816), 4 Camp. 283.

(*b*) Harman *v.* Vaux (1813), 3 Camp. 429.

Sect. 888. the banks, and there rested till they were cut away, this was held to be a stranding (*c*).

On mud-bank for two hours.

A ship was proceeding down a tidal river when the wind suddenly took her ahead, and she went ashore stern foremost on the mud bank of the river. There she remained fast for about two hours, till the tide flowed, when she got off and proceeded on her voyage; it was not found that she had sustained any injury. Lord Ellenborough held that this was a stranding; he says, "It is not merely touching the ground that constitutes stranding. If the ship touches and runs, that circumstance is not to be regarded. There she is never in a quiescent state; but if she is forced ashore, or driven on a bank, and remains for any time on the ground, this is a stranding, without reference to the degree of damage she may thereby sustain" (*d*). So, where a ship was driven by a current on a rock, and remained fixed there from fifteen to twenty minutes, it was held a stranding (*e*).

On a rock for twenty minutes.

But, where a ship coming out of a harbour struck on a rock, fell over on her beam ends, and after remaining so for a minute and a half floated off and proceeded on her voyage, Lord Ellenborough held that this was no stranding. "To use a vulgar phrase which has been applied to this subject, if it is 'touch and go' with the ship there is no stranding. It cannot be enough that the ship lay for a few moments on her beam ends. Every striking must necessarily produce a retardation of the ship's motion. If by the force of the elements she is run aground and becomes stationary, it is immaterial whether this be on piles or on rocks on the sea shore; but a mere striking will not do, wheresoever that may happen" (*f*). When the case came before the full Court, his Lordship said, "I take it that stranding in its fair legal sense implies a settling of the ship—some resting or interruption of the

Mere "touch and go."

(*c*) Dobson *v.* Bolton (1799), 1 Park, Ins. 239; 1 Marshall, Ins. 231; 2 Phillips, Ins. s. 1758.

(*d*) Harman *v.* Vaux (1813), 3 Camp. 429.

(*e*) Baker *v.* Towry (1816), 1 Stark. 436.

(*f*) M'Dougle *v.* Royal Exch. Ass. Co. (1816), 4 Camp. 283; *S. C.*, 4 M. & S. 503.

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voyage, so that the ship may *pro tempore* be considered as wrecked; from which misfortunes a great deal of damage does frequently occur" (*g*).

In the case of Baring *v.* Henkle (*h*), Lord Kenyon held that a ship in a tidal river which was fouled and driven on a bank, where she remained an hour, was not stranded. This decision, which is inconsistent with the later authorities, is very questionable (*i*).

No stranding where the ship takes the ground in the ordinary course of navigation.

889. Another important test is to ascertain whether the ship took the ground in the ordinary course of the navigation, or in consequence of some unusual and unexpected calamity.

"Where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the memorandum" (*k*).

Hearne *v.* Edmunds.

A vessel, under the care of a pilot, while being taken up Cork river, twice took ground from shallowness of water, and remained aground, on the first occasion eight, and on the second occasion ten, hours. She was each time floated off by the tide, and afterwards at high water was moored to a quay in Cork harbour: on the tide ebbing she fell over on her side, and lay on her broadside for two whole tides, by which the ship and cargo (which was warranted free of average) were much damaged. Taking the ground in the manner mentioned appeared in evidence to be no more than was usual with all vessels of the same class in the Cork river. This was therefore held not to be a stranding within the memorandum (*l*).

(*g*) 4 M. & S. 505.

(*h*) Baring *v.* Henkle (1801), 1 Marshall, 232; 2 Phillips, Ins. s. 1758.

(*i*) Per Taunton, J., in 3 B. & Ad. 27; per Lord Campbell in 1 E. & B. 460.

(*k*) Per Lord Tenterden in Wells *v.* Hopwood (1832), 3 B. & Ad. 34. As to the reasons for the rule, see per Tindal, C. J., 8 Bing. 463; Parke, J., in 3 B. & Ad. 29.

(*l*) Hearne *v.* Edmunds (1819), 1 Brod. & B. 388; 4 Moore, 15.

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So, where a vessel entered a tidal harbour, and was moored in the very place indicated by the harbour-master, and, upon the tide ebbing, took the ground in the precise spot where it was intended she should, and, in so doing, struck on some hard substance, whereby her bottom was damaged, this was held not to be a stranding, but a mere taking the ground in the ordinary course of the navigation (*m*).

But where the ground is taken by reason of some accidental occurrence or extraneous cause, that is a stranding.

890. "But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event is a stranding within the meaning of the memorandum" (*n*); or, as Tindal, C. J., expresses it, "where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause, that is a stranding" (*o*).

Instances: Breaking of rope, where improperly moored.

A pilot, contrary to the warning of the captain, and in his absence, fastened a ship by a rope to the pier of the St. George's dock basin, where the dock-master told him she would not lie safely. Soon afterwards the ship took ground astern, and, the tide ebbing, the rope broke, and she fell over on her side and was much damaged. The Court held that this was clearly a stranding, the ship having been taken out of the usual course, and improperly moored in the place where the accident afterwards happened (*p*).

Breaking knees by heavy swell.

The decision was the same where a ship took the ground in Boulogne harbour, and had her knees broken by a heavy swell running into the harbour (*q*).

Settling on piles owing to emptying canal.

A ship being in Wisbeach river (which is an artificial inland navigation) it became necessary to draw off the water: upon

(*m*) Kingsford *v.* Marshall (1832), 8 Bing. 458; 1 M. & Scott, 657. See also Magnus *v.* Buttemer (1852), 11 C. B. 876; 21 L. J. C. P. 119.

(*n*) Per Lord Tenterden, 3 B. & Ad. 34.

(*o*) 8 Bing. 464.

(*p*) Carruthers *v.* Sydebotham (1815), 4 M. & S. 77; and see the observations of Taunton, J., on this case, in 3 B. & Ad. 25.

(*q*) Fletcher *v.* Inglis (1819), 2 B. & Ald. 315.

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the water's sinking, the ship accidentally settled down on some piles, which were not previously known to be there. This was held to be a stranding, the event not being in the ordinary course of the navigation; for "we cannot suppose," says Abbott, C. J., "that these canals are so constantly wanting repair as to make the drawing off the water an occurrence in the ordinary course of the voyage" (*r*).

Taking ground when warped in harbour.

A ship, on entering a tidal harbour, struck the fluke of an anchor, and being afterwards moored in deep water was found to be in danger of sinking. For this reason she was warped further up the harbour, where she took ground and remained fast. This was held to be a stranding, for, as remarked by Bayley, J., "the ship, in this case, was laid on the strand, not in the ordinary course of navigation, but *ex necessitate* to avoid an impending danger" (*s*).

Falling over by breaking of rope.

A ship was obliged to put into a harbour which was dry at every tide, and was there moored alongside a quay where ships of her burthen usually lay: in addition to the usual moorings, it was found necessary to lash her by a rope fastened round her masts to posts on the shore; when the tide ebbed, this rope, not being of sufficient strength, broke; on which she fell over on her side and was stove in. This was held to be a stranding: the falling over having taken place, not in the ordinary course of the voyage, but in consequence of an unforeseen accident, viz., the breaking of the rope (*t*).

Taking ground upon a hard bottom.

Finally, the point was recently discussed in a case the facts of which were as follows:—The risk was on goods until safely landed at Dingle, a port in a tidal harbour on the west coast of Ireland, where vessels of the size of the ship in question could only reach the quay to unload during high spring tides. The vessel was in the course of being brought to the quay; but as it was found that she could not get within 20 feet of it, she was left where she was to await a higher tide,

(*r*) Rayner *v.* Godmond (1821), 5 B. & Ald. 225.

(*s*) Barrow *v.* Bell (1825), 4 B. & Cr. 736; *S. C.*, 7 Dowl. & Ryl. 244.

(*t*) Bishop *v.* Pentland (1827), 7 B. & Cr. 219; 1 Man. & Ryl. 49.

Sect. 890. it being intended that, in accordance with the usual practice, she should, while so waiting, take the ground on an even keel on hard sand. Instead, however, of doing so, she pitched by the head across a bank into a hole and remained in such a position as to cause her timbers to be strained, by reason whereof she made water and damage resulted to the cargo. The bank and tide which caused the mischief had not been previously known to exist, but were afterwards ascertained to have been fortuitously caused, and no vessel had met with a similar occurrence before. The Court of Appeal, affirming Field, J., accepted as correct the statement of the law in the cases above cited, but decided that under the circumstances the stranding was not in the ordinary course of navigation. "It is sufficient to say," said Brett, L.J., "that where by temporary circumstances the bottom of the harbour is in a different condition from its ordinary state, and a vessel takes the ground in a different manner from that which was intended, she may be said to be stranded" (*u*).

What is a sinking or a burning within the memorandum.

891. It may often be a question of some nicety to determine whether a vessel is "sunk" or "burnt" within the meaning of the memorandum. In The Glenlivet (*x*), a fire broke out on board the ship, in one of the coal bunkers, severe enough to do some damage to the plating before it was extinguished. The shipowner contended that any fire doing any structural damage was sufficient to constitute a burning of the ship. The Court of Appeal, however, while agreeing that a partial burning might be sufficient, held that the question as to whether, under all the circumstances of the particular case, the vessel was within the ordinary meaning of the English language a "burnt" ship, was one of fact, and that in this particular case the vessel had clearly not been "burnt."

There has been no judicial decision on the meaning of

(*u*) Letchford *v.* Oldham (1880), 5 Q. B. D. 538. Cf. also Wells *v.* Hopwood (1832), 3 B. & Ad. 20; Corcoran *v.* Gurney (1853), 1 E. & B. 456; 22 L. J. Q. B. 113.

(*x*) [1893] P. 164; [1894] P. 48.

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"sunk," and it may be doubted whether a vessel would be held to have "sunk" where she has been throughout capable of being navigated and has eventually reached port in safety. In Bryant & May *v.* London Assurance Co. (*y*) the vessel on arrival at Gravesend, with a cargo of match splints, had her deck submerged as far aft as the mainmast, and the cargo was much wetted. The plaintiffs contended that she had sunk as far as a vessel with such a cargo could sink. But a special jury found that there had been no sinking within the meaning of the memorandum.

The meaning of "collision" has been already dealt with when treating of the more general words in the policy (*z*). It is unnecessary to discuss this expression specially in this context.

The 5 and 3 per cent. clauses.

892. The object of both these clauses is the same, viz., to protect the underwriter against trifling claims. The former, comprising articles more liable to sea damage than the general cargo, though not so perishable as those which, in the first clause, are warranted free of all average, stipulates that with respect to them the underwriter shall not be liable unless the loss amounts to 5 per cent.; the latter clause provides that, with regard to the general cargo, the ship and freight, he shall not be liable unless the loss amounts to 3 per cent. (*a*).

I. How the required percentage is to be made up.

Upon the construction of these clauses many questions have arisen, which may, however, all be comprised under two general heads, viz.: 1. How is the required amount of loss to be made up in itself? 2. Upon what value is it to be calculated?

893. The first question that presents itself under the first head is this: Can successive losses, happening at different

(*y*) (1886), 2 Times L. R. 591; Gow, 180.

(*z*) *Ante*, ss. 795, 826. In America, cf. London Assurance *v.* Companhia de Moagens (1897), 167 U. S. 149.

(*a*) The articles specified in the 5 per cent. clause are generally called, together with those in the first clause, enumerated articles; the "other goods" included generally in the 3 per cent. clause, are called the non-enumerated articles.

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times, be added together, so as to make the underwriter liable if their aggregate amount exceeds 5 per cent. or 3 per cent. ?

With regard to freight and goods, there never has been any doubt that the true rule is to take the aggregate amount of the whole damage occasioned in the course of the voyage; on the ground that until the end of the voyage it is impossible to estimate the real amount of damage done to the cargo (*b*).

(1) Successive losses happening at different parts of voyage may be added together.

It was decided in 1832 that the rule was the same in this country with regard to the ship also (*c*). An earlier case in America had decided the contrary (*d*).

In 1885 the point was considered by the Court of Appeal (*e*). The decision of 1832 was declared to be binding as regards voyage policies. The law of this country, therefore, now is that successive, distinct and separate average losses, whether on ship, freight or cargo, may at the termination of a voyage covered by a voyage policy be added together, so that if the aggregate exceeds the stipulated percentage the underwriter will be liable.

As regards time policies, however, a distinction is made. It was argued on behalf of the shipowner, in the case in the Court of Appeal above referred to, that he was entitled to wait until the end of the year for which his vessel was insured and then add together all the average losses incurred, although they had been incurred in separate and distinct voyages during the year. It was held, however, in view of the long-established maritime practice of dividing the voyages and treating each voyage as a separate matter, that the ship-

(*b*) Benecke, Pr. of Indem. 473; Stevens, Av. 228; Donnell *v.* Columb. Ins. Co. (1836), 2 Sumn. 366.

(*c*) Blackett *v.* Royal Exch. Ass. Co. (1832), 2 C. & J. 244.

(*d*) Brooks *v.* Oriental Ins. Co. (1828), 7 Pick (Mass.) R. 259; disapproved, however, in Donnell's Case, *ubi supra*.

(*e*) Stewart *v.* Merchants' Marine Ins. Co. (1885), 16 Q. B. D. 619. Cf. also Price *v.* The A1 Ships Small Damage Ins. Assoc. Ld. (1889), 22 Q. B. D. at p. 588. The decision in Stewart's Case is severely criticised by Mr. Maclachlan in the 6th edition of this work (pp. 829—833).

owner could only add together such average losses as occurred in the same voyage (*f*). Sect. 893.

894. A second rule is, that general and particular average cannot be added together, so as to make the underwriter liable if their aggregate amount exceeds the requisite percentage (*g*). (2) Whether general and particular average can be added together to make up the amount.

The rule is so stated in the various text-books (*h*), but the statement is ambiguous. "General average" may denote either a general average sacrifice, or a general average expenditure, or a general average contribution. A general average sacrifice implies physical damage to, or actual loss of, a particular interest, and none the less is that particular interest lost or damaged, by reason of the fact that the sufferer is entitled to receive contribution in respect thereof from others. A general average expenditure or contribution, however, implies no physical damage whatever to any interest; ship, freight, and cargo are in themselves left unharmed; it is merely their owners who suffer pecuniary damage. It was never supposed that the required percentage could be made up, by adding to a particular average loss in respect of any one interest either a general average expenditure incurred primarily by the owner of that interest, or the amount leviable on that interest by way of general average contribution in respect of a loss sustained by another interest, and it is not clear that the text-book authorities above referred to meant anything more than this (*i*).

(*f*) The Institute Time Clauses (see Appendix) contain express provisions on this point.

(*g*) Stevens, Av. 232; Benecke, Pr. of Indem. 472; 2 Phillips, Ins. s. 1779.

(*h*) Benecke, 472; Hughes, 284; Stevens, 232; 2 Phillips, s. 1779; 2 Arnould, 2nd ed. p. 885.

(*i*) The reasons given appear to make this clear. Thus Benecke, after correctly stating that for the purposes of the memorandum particular average does not comprise particular charges, continues, "for the same reason, general and particular average cannot be added" to make up the required percentage. Now, the reason why particular charges are not included in particular average is simply because the actual damage suffered by the interest in question itself, as distinct from the pecuniary loss sustained by its owner, is in no way increased by the necessity of incurring charges in relation thereto. This is an equally good reason why

Sect. 894. "Average" in the memorandum means physical damage to, or actual loss of, the subject-matter to which the term is applied. But when the same interest has sustained physical damage from two causes, one of which does, but the other does not, give the right to a general average contribution from the other interests, is there any reason why these two losses should not be added together?

895. This question was recently discussed in the Court of Appeal (*j*), and it was decided that the fact that a partial loss is a general average loss is sufficient to prevent the sufferer from adding its amount to that of another partial loss on the same interest, which is a particular average loss, so as to bring the total up to 3*l.* per cent. Thus, if a vessel sustains fortuitous injury by a peril of the sea, and subsequently sustains further injury by reason of the sacrifice of a mast for the general safety, it is not permissible, according to the authority of this case, to add together the amount of the losses so caused in order to bring the total up to the requisite percentage. It must be confessed that this decision appears surprising, especially in view of the decision in Dickenson *v.* Jardine (*k*), where it was held that general average losses, if caused by a peril insured against, were recoverable by the assured from the underwriter direct—the only difference between such losses and particular average losses being that the underwriter was, in respect of the former, entitled by subrogation to recover contribution from the owners of the other interests. There is much force in the contention that as between assured and insurer, all partial losses caused by perils insured against are recoverable from underwriters as particular average in the first instance, general average principles only arising subsequently as between the owners of the several interests. Such, too, was the view adopted in

Criticism of Price's Case.

general average expenditure or contribution should not be added to particular average, but it affords no ground for the contention that a general average sacrifice should not be added to a particular average on the same interest.

(*j*) Price *v.* The A1 Ships Small Damage Assoc., [1889] 22 Q. B. D. 580.

(*k*) (1868), L. R. 3 C. P. 639.

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business circles ever since 1868, the date of Dickenson *v.* Jardine, until 1889, that of Price's case (*l*). The Court of Appeal base their decision in Price's case upon (1) the opinions expressed in the various text-books (*m*); (2) an early American decision (*n*); and (3) the established view of, and practice in, the trade. But (1), as we have already observed, the rule as stated in the text-books is stated in the same ambiguous terms as in this text, and while it is admittedly applicable to cases of general average expenditure and contribution, it is at least doubtful whether the writers ever meant their statements to apply to cases of general average sacrifice; (2), the American decision does not appear to cover the point. It was a case where the vessel had sustained particular average damage, which made it necessary to take her into a port of refuge to refit. It was held merely that the partial damage actually sustained by the vessel could not be added to the vessel's share of the general average expenditure, on the ground that "the damage sustained by the vessel is the partial loss, but the contribution is a charge to which the property saved is made liable by the marine law." As for (3), the Court appears to have been mistaken. Until the decision in question, the practice had always been, ever since 1868, when Dickenson *v.* Jardine was decided, to add together all partial damage suffered during the voyage, whether contribution were leviable in respect of any part of such damage or not. It is only since this decision that the practice has been altered in order to conform therewith (*o*).

(*l*) See McArthur, 386; Gow, 312.

(*m*) See n. (*h*), *supra*.

(*n*) Padelford *v.* Boardman (1808), 4 Mass. 548.

(*o*) See McArthur and Gow, *ubi supra*. The rule of practice adopted in consequence of the decision in Price's Case by the Association of Average Adjusters is as follows:—"That in case of general average sacrifice there is, under ordinary policies of insurance, a direct liability of an underwriter on ship for loss of or damage to ship's materials, and of an underwriter on goods or freight, for loss of or damage to goods or loss of freight so sacrificed as a general average loss; that such loss, not being particular average, is not taken into account in computing the memorandum percentages, and that the direct liability of an under-

writer for such loss is consequently unaffected by the memorandum or any other warranty respecting particular average."

For a further very clear criticism of this case see McArthur, 252, and Appendix IV. Mr. McArthur quotes from the shorthand notes of the judgment of Lord Esher, as actually delivered, to show that his Lordship was under a misapprehension as to the real facts of the case. On the incorrect version of the facts which appears from these notes to have been entertained by Lord Esher, the decision is not open to criticism, and would be on all-fours with the American case; but on the real facts of the case, the correct version of which is set out in the Law Reports, the decision is undoubtedly impeachable for the reasons we have given.

(p) Stevens, 230; Benecke, 472.

(q) Stevens, 230.

(r) Benecke, 472; 2 Phillips, Ins. s. 1777. Cf. Kidston v. Empire Ins. Co. (1866), L. R. 1 C. P. 535; 2 C. P. 357.

(s) Benecke, Pr. of Indem. 474; 2 Phillips, Ins. s. 1791.

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sufficient, though it may not amount to 5 or 3 per cent. on the interest subsequently at risk under the policy. This is established by a very revolting instance. In a policy on a slave ship the slaves were warranted "free of average under 5 per cent. for loss from insurrection." An insurrection took place at a time when there were only forty-nine slaves on board: seven were killed in suppressing it. It was held that the underwriters were liable, this being a loss exceeding 5 per cent. of the number on board when it took place, though it was by no means 5 per cent. of the number that ultimately formed the complete cargo (*t*).

When insured in gross, the percentage is calculated on the whole quantity of each enumerated article

(2.) Upon the articles enumerated in the 5 per cent. clause when insured in gross (as is often the case with hides, flax, hemp, &c.), the proportion of damage is calculated upon the whole amount of each specified article taken separately, *i.e.*, the construction of the memorandum is the same as if it were worded "sugar free of average under 5 per cent., tobacco free of average under 5 per cent., hemp free of average under 5 per cent.," and so on with the rest of the enumerated articles. Thus, if flax and hemp be insured together, valued at 1,000*l.*: let the aggregate amount of damage upon both articles be 100*l.*, *i.e.*, 10 per cent. on their whole value taken jointly; yet, unless the damage on each amounts to 5 per cent. of its value taken separately, the claim can be made good only on the one on which it reaches that amount (*u*).

When not enumerated, then on all together; except where each class of commodities is separately valued.

(3.) Where, however, as in the 3 per cent. clause, the rest of the cargo, under the general term "all other goods," is warranted free of average, without any specific enumeration of distinct classes, it is obvious that the same rule cannot apply; accordingly, the practice is to regard the whole of the non-enumerated articles as forming together one mass of property, and then to calculate the percentage of damage on their aggregate value (*x*); unless, indeed, the non-enumerated articles have been separately valued in the policy, for then, it

(*t*) Rohl *v.* Parr (1796), 1 Esp. 445.

(*u*) Stevens on Average, 223; 2 Phillips, Ins. s. 1785.

(*x*) 2 Phillips, Ins. s. 1786.

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seems, such separate valuation gives a distinct basis on which to compute the damage, as, *e.g.*, if coffee is valued at 300*l.* and tea at 3,000*l.*, the amount of damage on the coffee must amount to 9*l.*, and on the tea to 90*l.*, in order to make the underwriter liable; if it were 11*l.* on the coffee and 89*l.* on the tea, he would be liable on the former only, and not on the latter (*y*).

Where merely shipped in separate packages, without separate valuation, the percentage of loss is calculated on the whole.

(4.) Where, however, large quantities of the same description of articles, whether enumerated or unenumerated, are made up in separate packages, the damage must amount to 5 per cent. or 3 per cent. of the whole aggregate of packages of the same class of goods, and cannot be calculated upon each separate package.

Thus, suppose 101 hogsheads of sugar or 101 bags of coffee to be insured free of average, the former under 5 per cent., the latter under 3 per cent.; suppose, further, five of the hogsheads or three of the bags to be so damaged as to be wholly unfit for use, the underwriter is not liable (*z*).

Clauses specially inserted to avoid this mode of calculating the percentage.

899. It is obvious that this mode of estimation must in many cases be unfavourable to the assured; in order, therefore, to protect himself and render the underwriter liable, where otherwise, on the strict construction of the memorandum, he could not be so, certain stipulations have been introduced into the policy on behalf of the assured, as *e.g.*, in the case of a steamer, "hull valued at *l.*, machinery at *l.*, to pay average on each as if separately insured;" or, in case of goods, "to pay average on each species, as though separate interests separately insured;" "To pay average on ten, fifteen or twenty hogsheads, succeeding numbers," or, "running landing numbers, as if, &c.," as before. If there are no numbers, in such case the practice is to disregard the clause entirely, and to pay the average only if it amount to the stipulated percentage on the whole

(*y*) 2 Phillips, Ins. s. 1788; and the case of Ocean Ins. Co. *v.* Carrington (1820), 3 Conn. R. 357, there cited.

(*z*) 1 Magens, 73; Stevens, 224; Benecke, 474.

quantity (*a*). To meet the case where manufactured goods are shipped in bales or packages, the general clause inserted is, "To pay average on each package, as if separate interests separately insured" (*b*). Sect. 899.

900. The effect of these clauses is to make the underwriter liable in many cases where he would have escaped from liability altogether upon the strict construction of the usual printed clauses. Effect of these clauses.

Thus, let 1,000*l.* be insured on ten cases of manufactured goods valued at 100*l.* each case, "to pay average on each package, as if separate interests separately insured;" suppose five of the cases to be damaged each 3 per cent., or 15*l.* in the whole, then compensation may be claimed from the underwriters, though, without the clause, the loss must have amounted to 30*l.* in order to make them liable (*c*).

If the damage exceeds the required percentage on the whole amount, the assured may, at his option, calculate the percentage either on the whole amount or on the damaged packages. Where damage exceeds the required percentage on the whole amount as well as on the separate lots.

Thus, supposing on the same data one of the cases to have been damaged 50 per cent., or 50*l.*, and the rest to arrive damaged only 1 per cent., the assured may recover the amount of damage on the nine cases, though under the required percentage, because the whole damage exceeds 5 per cent. on the whole value. The reason is, that this clause, having been introduced for the benefit of the assured, must be construed in his favour (*d*).

Stevens said that the insertion of these clauses was in his time so much a matter of general usage whenever goods were insured direct from their place of growth or manufacture, Liberal construction where these clauses are not inserted.

(*a*) Benecke, Pr. of Indem. 478; and see note, *ibid.*

(*b*) Stevens, 220.

(*c*) *Ibid.* 226.

(*d*) Hagedorn *v.* Whitmore (1816), 1 Stark. 157; Stevens, 226; Benecke, Pr. of Indem. 476. The words "or on the whole" are often inserted, so as to make it clear that the assured has this option.

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that, even when omitted, the policy was acted upon as though they had been introduced (e).

It has been decided in the United States that, in order to calculate whether the percentage of loss amounts to 5 or 3 per cent. on the insurable value of the goods, the premium is to be deducted from that value (f); but no such principle appears to be acted upon in this country; on the contrary, the rule here is that the underwriter is liable whenever the loss under the limitations already pointed out amounts to 5 per cent. or 3 per cent. on the value in the policy, or on the prime cost plus the premium and other costs of insurance.

If the percentage exceeds the required amount, the underwriter is liable for the whole amount of loss, and not merely for the surplus.

It appears to have been the intention of those by whom the clause was first introduced, that the surplus only of loss above the 5*l.* or 3*l.* per cent. should be paid by the underwriter; the practice, however, in this country, has uniformly been that, when the loss exceeds the excepted amount of percentage, the underwriter is liable for the full amount of the loss, and not only for the surplus (g).

The "free of particular average" clause.

901. It will be noticed that the arrangement of all articles of commerce into the three classes contained in the memorandum is a very rough one, and is simply made by forming two classes out of a dozen enumerated articles and throwing all else into the residuum. This arrangement has in recent years been very much developed, with the result that the common memorandum has in practice been very largely superseded by the insertion of special terms adapted to the particular articles at risk. It is probable that, although the memorandum was itself originally introduced in order to restrict the liability of underwriters for particular average claims, its modern development has been just as much due to the acuteness of the merchant displayed in his search for the exact form of insurance which, as regards each particular subject of commerce, will afford adequate protection for real

(e) Stevens, 225.

(f) Brooks v. Oriental Ins. Co. (1828), 7 Pick. R. 509; 2 Phillips, s. 1790.

(g) Stevens, 227. So in the United States, 2 Phillips, s. 1791. As to the "Jansen" clause, however, see s. 882, n. (c), *ante*.

perils without throwing upon him the burden of paying for such as are not likely to arise. For example, some cargoes are not much liable to partial losses; the probability is that if they arrive at all they will arrive undamaged. The real danger in such a case is that of total loss. The merchant recognising this fact insures at a cheaper rate with a warranty against particular average. In an English policy this warranty now takes the following, or some similar form, evolved after many years of bargaining between underwriter and merchant (*h*) :— Sect. 901.

"Warranted free from particular average, unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance.

"Underwriters, notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse rent, reshipping, or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transhipment.

"Grounding in the Suez Canal not to be deemed a strand, but underwriters to pay any damage or loss which may be proved to have directly resulted therefrom" (*i*).

And apart from settled clauses, many of the large London merchants have special arrangements with their underwriters, providing for the exact risks insured against, which vary according to the nature of each article of commerce.

902. Clauses similar to the "free from particular average" clause in a cargo policy are used with respect to ship. It often happens that an insurer against all risks wishes to transfer part of the risk to other shoulders: this he may do by effecting a re-insurance "against total loss only." The re-insurer will then be exempt from all average claims, par- "Total loss only."

(*h*) For an account of the process by which the warranty in its present form was eventually arrived at, see Gow, Marine Insurance, 183—187.

(*i*) The Institute Clauses should also be referred to, which, as regards insurances on ships, are much more favourable to underwriters. See Appendix.

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ticular or general, and also from salvage charges (*k*), but will be liable for a constructive, as well as for an actual, total loss (*l*). Liability for a constructive total loss is sometimes excluded by insuring "against the risk of absolute total loss only." A vessel, however, which was originally only a constructive total loss may, owing to continued operation of the perils, become an actual total loss, so as to render underwriters liable under this clause (*m*).

Warranties to be free of seizure and confiscation in port of discharge, &c.

903. During the Napoleonic war, when almost all the ports of the Baltic were in a state of occasional hostility to this country, and the adventurous expeditions to those seas were undertaken without any fixed destinations (the election of the ports of discharge being necessarily left to the captain's discretion, according to the exigencies of the case), it became frequent for the underwriters to insert a stipulation that they should not be answerable for the risk of capture, seizure, or confiscation in the ship's port of discharge, or in port or ports generally.

Warranty to be free of seizure in ships. What is the ship's port of discharge within the meaning of the warranty.

Various cases were decided on the construction of these clauses, in most of which the sole question was, whether the ship, at the time of seizure, was in that, which, with reference to the nature of the risk and the whole circumstances of the case, could fairly be regarded as her port of discharge, within the contemplation of the parties to the policy. The Courts, as the nature of the subject required, exercised great liberality of construction in forming a judgment on this point, guiding themselves rather by the nature of the risk and the intention of the parties, than by the strict and legal meaning of the term "port."

Hence, it was decided by Lord Ellenborough, that if a ship, "warranted free from capture and seizure in her port of dis-

(*k*) Dixon *v.* Sea Ins. Co. (1880), 4 Asp. M. L. C. 327. This decision, however, applies only to salvage charges proper, which were held in Lohre *v.* Aitchison not to be recoverable under the suing and labouring clause.

(*l*) Adams *v.* McKenzie (1863), 32 L. J. C. P. 92.

(*m*) Levy *v.* Merchants' Marine Ins. Co. (1885), 5 Asp. M. L. C. 407.

charge," once come within the danger of capture from the land, for the purpose, and with the intention, of discharging her cargo, she should be considered to be in her elected port of discharge within the meaning of this warranty; and this whether she come to an anchor in an open roadstead outside a harbour, the same being a place where ships of burden usually unload (*n*); or lie on and off in a river forming the estuary of a port, waiting for intelligence (*o*); provided in each case, that this be done for the purpose and with a design of discharging there; of which purpose and design the jury are the best, and, indeed, only proper judges (*p*). If, on the other hand, the ship be moored, not only outside the harbour, but in the open sea, outside the roadstead, in which ships usually discharge their cargoes, though she be there captured by a force from the shore, this is not a loss from which the underwriters are protected by the warranty (*q*). Sect. 903.

904. Confiscation means more than capture, and imports "an act done in some way on the part of the government of the country where it takes place, and in some way beneficial to that government, though the proceeds need not, strictly speaking, be brought into its treasury" (*r*). Hence, where a ship, "warranted free from confiscation by the government in the ship's port or ports of discharge," was boarded in Pillau roads (a Prussian port) by two parties, one of Prussian soldiers, the other, part of the crew of a French privateer, and was condemned by the Prize Court at Paris as prize to the French captors, and the property given up to them; this Warranty to be free of confiscation in port of discharge.

(*n*) Dalgleish *v.* Brooke (1812), 15 East, 295, the leading case on the subject of this warranty; Oom *v.* Taylor (1812), 3 Camp. 204; Maydhew *v.* Scott (1812), *ibid.* 205.

(*o*) Jarman *v.* Coape (1811), 13 East, 394; *S. C.*, 2 Camp. 613.

(*p*) Keyser *v.* Scott (1812), 4 Taunt. 660; Reyner *v.* Pearson (1812), 4 Taunt. 662; Levin *v.* Newenham (1813), *ibid.* 722.

(*q*) Mellish *v.* Staniforth (1811), 3 Taunt. 499; Levy *v.* Vaughan (1812), 4 Taunt. 387; Keyser *v.* Scott (1812), *ibid.* 660; Levin *v.* Newenham (1813), *ibid.* 722.

(*r*) Per Lord Ellenborough in 15 East, 269.

Sect. 904. was held not to be a confiscation by the Prussian government, and therefore not a risk excepted by this warranty (*s*).

Warranty to be free of capture and seizure in port generally.

905. The Courts put a different construction on the warranty to be free of capture in the ship's "port of discharge," and on the warranty to be free of capture "in port or ports" generally (*t*). In the first case, they considered the intended place of unloading "the port of discharge," though an open roadstead, and not *infra præsidia portus:* in fact, as Bayley, J., expressed it, in Jarman *v.* Coape, the word "port" in such warranties was regarded as used in contradistinction to the high seas (*u*). On the other hand, they determined that a warranty against capture in port generally could not be available for the underwriters, unless the ship, at the time of capture, was actually within some port; and that it was not sufficient, under such a warranty, that she should then be in an open roadstead, where ships, in ordinary circumstances, sometimes lighten, but never discharge, their cargoes (*x*); nor within the headlands which form the mouth of a river. Hence, where a ship, insured from Rotterdam to London, and "warranted free from capture in port," was captured while lying at anchor off Ghoree, in the river Maes, within the headlands which form the mouth of that river, the underwriters were held liable (*y*).

The modern Lloyd's form of this warranty is as follows: "Warranted free of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

"In the construction of this warranty," said Lord Fitzgerald, "it is observable that 'capture' and 'seizure' do not mean the same thing. 'Capture' would seem properly to

(*s*) Levi *v.* Allnutt (1812), 15 East, 267.

(*t*) Per Lord Ellenborough in Jarman *v.* Coape (1811), 2 Camp. 614.

(*u*) Per Bayley, J., in Jarman *v.* Coape (1811), 13 East, 398.

(*x*) Brown *v.* Tierney (1809), 1 Taunt. 517.

(*y*) Baring *v.* Vaux (1810), 2 Camp. 541.

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include every act of seizing or taking by an enemy or belligerent. 'Seizure' seems to be a larger term than 'capture,' and goes beyond it, and may reasonably be interpreted to embrace every act of taking forcible possession either by a lawful authority or by overpowering force" (*s*).

If a ship with such a warranty be lost under such circumstances that the proximate cause of loss is perils of the seas, though she be also captured and condemned, the underwriter will not be protected by the warranty (*a*); on the other hand, although she may have been severely damaged by sea perils, and thereby exposed to seizure, yet, if the capture and condemnation be the proximate cause of loss, the underwriter will be discharged (*b*).

Under a warranty to be free from capture or seizure, it matters not whether the act done be lawful or unlawful, whether by pirates, mutinous passengers, or persons armed with state authority: the underwriter is not liable (*c*).

Where a ship, warranted "free of capture and seizure, and the consequences thereof in her port of loading," in order to avoid such seizure ran to sea before she was properly loaded, and was in consequence obliged to put into a port out of the course of the voyage insured, it was held that the underwriters under this policy were not liable (*d*), but where the freight of the same ship was insured by a policy which did not contain this warranty, it was held that they were liable for the same loss (*e*).

(*s*) Cory *v.* Burr (1883), 8 App. Cas. at p. 405.

(*a*) Hahn *v.* Corbett (1824), 2 Bing. 205; 9 Moore, 390; Ionides *v.* The Universal Marine Ins. Assoc. (1863), 14 C. B. N. S. 259; 32 L. J. C. P. 170.

(*b*) Livie *v.* Janson (1810), 12 East, 648; Green *v.* Elmslie (1792), Peake, 212.

(*c*) Powell *v.* Hyde (1855), 5 E. & B. 607; Kleinwort *v.* Shephard (1859), 1 E. & E. 447; 28 L. J. Q. B. 147; Cory *v.* Burr (1882), 9 Q. B. D. 463; 8 App. Cas. 393; Johnston *v.* Hogg (1883), 10 Q. B. D. 432.

(*d*) O'Reilly *v.* Royal Exch. Ass. Co. (1815), 4 Camp. 246.

(*e*) O'Reilly *v.* Gonne (1815), 4 Camp. 249. The defence of the underwriters in both these cases was deviation.

CHAPTER IV.

OF GENERAL AVERAGE.

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Principles of the doctrine of general average.

906. THE term "General Average" is used indiscriminately, sometimes to denote the kind of loss which gives a claim to general average contribution, and sometimes to denote such contribution itself; in order to avoid confusion, it would have been better to use the term general average loss when speaking of the former, and general average contribution when speaking of the latter. A general average loss, and the consequent right to levy a general average contribution, can only arise out of a general average act. A general average act may consist either of the voluntary destruction of or parting with some tangible portion of the ship or cargo, or of the voluntary adoption of some extraordinary measure involving a subsequent loss or expenditure of money. In either case there is in reality a sacrifice: in the former case the sacrifice is itself the loss which is immediately apprehended, whilst in the latter case the sacrifice is in itself

General average acts divided into two classes, but must in reality always be acts of sacrifice.

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no present loss, but leads to loss or expenditure in the future (*a*). A loss of the former kind is generally called a general average sacrifice; a loss of the latter kind is generally called a general average loss or expenditure. It is true to say that a general average sacrifice must be made at a moment of peril in order to secure safety. When, however, this is said of a general average expenditure, it must be remembered that the expenditure itself is usually not made until after all danger is over. It is not necessary that the actual expenditure of the money should be made at a moment of peril; it is only necessary that the ship and cargo should have been in peril at the time when the extraordinary measures were adopted which subsequently entailed the extraordinary expense.

907. It is proposed in the following pages to follow the ordinary division of general average losses into two classes, namely:—1. Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save both from perishing. 2. Those which consist in extraordinary expenses incurred, owing to extraordinary measures undertaken for the preservation of both ship and cargo.

Losses of the first class are those which are alone mentioned in the text of that Rhodian law which is generally regarded as the foundation of the whole doctrine of general average (*b*): but it is evident that expenses incurred by the owner of a part, owing to extraordinary measures adopted for the preservation (*c*) of the whole, give just as valid a claim

(*a*) The sacrificial element in this case was clearly apprehended by Lopes, J., in Svendsen *v.* Wallace (1883), 11 Q. B. D. at p. 617:—"The putting into a port of refuge . . . . is an act of voluntary sacrifice." So, also, throughout the judgment of Bowen, L. J., 13 Q. B. D. at pp. 83—95; and per Baggallay, L. J., at p. 81.

(*b*) The bare text of that law, in fact, does not extend to the sacrifice even of part of the ship, and is confined in terms solely to the case of jettison:—"Jactus factus levandæ navis gratiâ."

(*c*) Instead of "preservation," earlier editions of this work had "joint benefit," or some such expression. See 2nd ed. p. 895. The editors have throughout this chapter, in accordance with the view of the Court of Appeal expressed in Svendsen *v.* Wallace (1884), 13 Q. B. D.

Sect. 907. to contribution in general average as any other species of loss intentionally incurred for the same purpose; and they have been accordingly admitted to give such a claim by the law and practice of all maritime states.

There is no difference in principle between these two classes of losses; but the application of the principle, as we shall see in the sequel, leads to different results in the two cases: and upon this ground it becomes of practical importance to bear the distinction in mind.

Definition of general average losses.

A general average loss has been authoritatively defined to be "a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the preservation of ship and cargo" (*d*).

Principle and definition of general average contribution.

908. The plainest principles of equity require that the sacrifices so submitted to should be made good (*sarciantur*), and the expenses incurred repaid, by a general contribution from all those benefited by either the one or the other, in proportion to the value of the property which those sacrifices and expenses have been instrumental in saving (*e*). Hence, a

69, substituted the word "preservation" or "safety." They have also made corresponding alterations in order to make it clear that, although the expenses need not be incurred at a time when the interests are in peril, yet they must be necessitated by measures taken at a time of peril for the common safety.

(*d*) Per Lawrence, J., in Birkley *v.* Presgrave (1801), 1 East, 220, 228; adopted literally by the Court of Appeal in Svendsen *v.* Wallace. Notwithstanding the high authority of this definition, the editors venture to criticise it if and in so far as it implies that a general average expenditure is independent of the idea of sacrifice as explained in the text; also if and in so far as it implies that the extraordinary expenses must necessarily be incurred at a time when ship and cargo are actually in peril. It is submitted that a more correct definition, especially in view of modern decisions, is "a loss consisting in extraordinary sacrifices made, or in expenses incurred through extraordinary action taken, for the preservation of ship and cargo."

(*e*) Æquissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum, consecuti sunt, ut merces suas salvas habuerint. Dig. lib. xiv. tit. 2. There have been differences of opinion as to whether the right to contribution arises out of an implied contract, or in some other way. Cf. Lowndes, 24—27. The present editors, while agreeing with Bowen, L. J., in Burton *v.* English (1883), 12 Q. B. D. 218, at p. 223, that the question is in most cases one merely of words, conceive nevertheless that in some cases it may be one

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general average contribution may be defined to be a contribution by all parties in a sea adventure, to make good the loss which has been sustained by one or more of their co-adventurers from sacrifices made, or expenses incurred, for the preservation of the whole.

Adjustment of general average and liability of the underwriters.

The amount paid by each of the co-adventurers, as his share of the contribution, is exactly proportioned to the value of his property as saved by the sacrifice (*f*); this sum is ascertained in most cases directly after the ship's arrival at her port of destination, and is there assessed upon each of the co-adventurers, who are in law primarily liable to the party who has suffered by the loss. The owner of the property sacrificed is then, if insured, reimbursed by his underwriters in respect of his loss. The latter then, by subrogation, become entitled to claim against the owners of the interests saved, who in their turn are, if insured, entitled to claim from their underwriters the same proportion of the sum insured in the policy as the amount assessed upon them by way of contribution bears to the whole value of their property, as saved by the sacrifice (*g*). In practice, accordingly, whenever ship or goods are insured, general average losses, when their amount is once ascertained, are settled by the underwriters. The process by which the amount of damage is ascertained, and the different sums to be paid in contribution for it are assessed upon the parties

of practical importance. The view best supported by judicial authority in this country is that the right arises not out of contract, but from the old Rhodian laws, and has thence become incorporated into the laws of England as the law of the ocean. Cf. Burton *v.* English, *ubi supra*; also Milburn *v.* Jamaica Fruit, &c. Co., [1900] 2 Q. B. at pp. 546 and 550, per A. L. Smith and Vaughan Williams, L. JJ. This view was not that of Lord Bramwell (see Wright *v.* Marwood (1881), 7 Q. B. D. 62), and was strenuously impugned by Mr. Maclachlan in the 6th edition of this work (p. 860). It is, however, the view which has been generally adopted in America (cf. The Roanoke (1893), 59 F. 161; The Eliza Lines (1896), 61 F. 308, 325; Marwick *v.* Rogers (1895), 163 Mass. 50), and commends itself as the better view to the minds of the present editors.

(*f*) There is, however, as regards contributing interests and values, a distinction to be drawn between cases of sacrifice and of expenditure. The point is discussed later, ss. 975—977.

(*g*) 1 Magens, Ins. 55.

Sect. 908. interested, and made good to them by the underwriters, is called the adjustment of general average. It should, however, be remembered that the law of general average is part of the maritime law, and should always be studied as such independently of questions of insurance, however much they are mingled together in practice (*h*).

A general average loss must result from the act of man, as distinct from accident.

909. Having thus given a brief sketch of the doctrine of general average, let us proceed to examine it more in detail, and commence by inquiring into the characteristics of those losses which give a claim to general average contribution. The leading characteristic of a general (as distinct from a particular) average loss is, that it is the intentional result of the act of man (*i*), not the inevitable result of the perils insured against; it arises from damage purposely submitted to, or directly effected by the agency and will of man, not accidentally caused by the agency of the winds and waves (*k*).

A storm arises, the ship is making water with every sea, or is drifting in upon rocks and breakers, and in imminent danger of being lost; if goods are thrown overboard to lighten her, or masts cut away to bring her up, the damage so sustained by the owner of the goods or of the ship is a loss which gives him a claim to general average contribution—in other words, is a general average loss. If, under similar circumstances, instead of being thus sacrificed for the common safety, the goods are washed out by the waves, or the mast snapped asunder by the wind, the loss falls entirely upon the party whose property was thus damaged—in other words, is a particular average loss.

(*h*) See The Brigella, [1893] P. 195; but cf. *contra*, Montgomery *v.* Indemnity Mutual Mar. Ins. Co., [1901] 1 Q. B. 147.

(*i*) According to the very high authority of the Supreme Court of the United States in Ralli *v.* Troop (1894), 157 U. S. 386, it must be the voluntary act of the master of the vessel, and of no one else, done for the safety of the common interests intrusted to his care, and with no other object. It is doubtful, however, whether this view is consistent with the opinion of Mathew, J., in Papayanni *v.* Grampian S.S. Co. (1896), 1 Com. Cas. 448.

(*k*) 1 Emerigon, c. xii. s. 39, p. 588.

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The loss must be incurred for the general safety.

910. In order to entitle the party sustaining such loss to a general average contribution, it must appear to have been incurred with a view to the general safety of the ship, cargo, and freight (*l*). The principle of the Rhodian law is, *ut omnium contributione sarciatur quod pro omnibus datum est* (*m*). The loss, which is to entitle one of the co-adventurers to a contribution from all, must be suffered for the sake of all; and accordingly we find that the sea laws of the Middle Ages invariably required that the master, before he could claim a general average contribution, should swear that the sacrifice was made to save the ship, the cargo, and the lives and liberties of the crew (*n*).

Where the general safety is not imperilled, a loss incurred for the safety of part gives no claim to contribution.

So it has been held in this country that where the general safety is not imperilled, a loss incurred for the safety of a part thereof cannot give a claim to contribution in general average. Thus, where a mob in Ireland boarded a ship partly laden with corn, and would not leave her till they had compelled the captain to sell them the corn at a certain low rate, it was contended, on the part of the assured, that as the captain was thus obliged to let the people take the corn, in order to induce them to spare the rest of the cargo, this was a general average loss; but Lord Kenyon held that this was not so, because the other interests never were in jeopardy: for the persons who took the corn intended no injury to the

(*l*) Phillips, however (Ins. vol. ii. s. 1273), is probably correct in pointing out that though the sacrifice must usually be on account of the entire interest at risk in ship, freight and cargo, yet contribution may be due from a part only of those interests when only a part is in peril so as to be benefited by the expenses or sacrifices. Cf. Hingston *v.* Wendt (1876), 1 Q. B. D. at p. 372. And a sacrifice or expenditure may, for some purposes at least, be treated as a matter of general as distinct from particular average, though the safety of some portion may never have been imperilled. See Oppenheim *v.* Fry (1864), 3 B. & S. 873; 5 *ibid.* 348; Phillips, s. 1274.

(*m*) Dig. lib. xiv. tit. 2, f. 1.

(*n*) "Pour saufver leurs corps, la neéf, et les darreés." Jugemens d'Oleron, art. 8; Pardessus, Lois Mar. vol. i. p. 328. "Tho beholden ihr Liff, Schiff, und Gut;" Laws of Wisbuy, art. 22; Pardessus, Lois Mar. vol. i. p. 476. "Les personnes, et le haver, et tot quant açi ha;" Consolato del Mare, c. 54, of the original Catalan; Pardessus, Lois Mar. vol. ii. p. 104; c. 97 of the Italian translation.

Sect. 910. ship, or any other part of the cargo, but the corn only. Upon the same principle Benecke maintained that if the master of a neutral ship, who had secretly taken enemy's goods on board, should, from fear of having these goods confiscated, slip his anchor or throw those particular goods overboard, neither he nor the owners of these goods would have any claim to contribution upon the other parties to the adventure, because such sacrifice was made not to save the whole, but only a part (*p*). In the same way, where expenditures appear to have been made not on behalf of both ship and cargo, but on behalf either of the ship alone, or of the cargo alone, they can give no claim to general average contribution, but will be a charge on the owner of the particular interest preserved by the adoption of the course which necessitated such expenditures.

The general safety must be the object of the sacrifice.

911. The general safety must also be the motive for the sacrifice; and if made with any other object, it can give no claim to a general average contribution. Thus, no claim could be allowed in a case where the captain of a ship which was just on the point of capture threw overboard a quantity of dollars, not to save the ship and cargo, but merely to prevent the dollars from falling into the enemy's hands (*q*).

This rule has been recently laid down with great emphasis in the Supreme Court of the United States. The cargo in the hold of the "J. W. Parker" took fire while the vessel was moored in port at Calcutta, near other vessels. She was taken possession of by the port authorities, who eventually—in spite of the protests of the master, who believed it to be

(*o*) Nesbitt *v.* Lushington (1792), 4 T. R. 783.

(*p*) Benecke, Pr. of Indem. 223.

(*q*) The case of Butler *v.* Wildman (1820), 3 B. & Ald. 398) contains an *obiter dictum* to this effect by Holroyd, J., which was adopted by Shee, J., in the 8th edition of Abbott on Shipping (p. 479); and see 5th edition (p. 344) to the same effect. See also Royal Mail Steam Packet Co. *v.* English Bank of Rio (1887), 19 Q. B. D. at p. 378, per Wills, J.; and Job *v.* Langton (1887), 56 L. J. Q. B. 97; Walther *v.* Marrojani (1870), L. R. 5 Exch. 134; Kemp *v.* Halliday (1865), 34 L. J. Q. B. 233; L. R. 1 Q. B. 520—which cases are more particularly noticed at ss. 967—969, *infra*.

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possible to save part at least of the cargo before taking any extreme measure—extinguished the fire by scuttling the vessel. The Circuit Court had found as a fact that the measures taken by the port authorities were the best available to extinguish the fire and to save greater loss on the cargo, but did not find whether their purpose was to save this vessel and her cargo, or to save other vessels and property in the port; and the Supreme Court drew the inference that inasmuch as their sole office and duty was to protect the shipping generally, such had been their object in this particular case. It was held, therefore, that as the object of the sacrifice had not been to save this particular vessel and cargo, there could be no right to a general average contribution (*r*).

Need the sacrifice have been successful in averting the peril?

912. A question that has been much discussed is whether the peril must be averted by the sacrifice, in order to give a claim to general average contribution. In other words, must the sacrifice have been successful? The point may be raised under two different sets of circumstances. Firstly, a sacrifice may be properly and judiciously made, and the remaining interests may be subsequently preserved, but such preservation may be in no sense due to the sacrifice, but to the intervention of other causes, *post hoc*, and not *propter hoc*. In such a case it is confidently submitted that though the sacrifice has produced no good results, and cannot therefore be called successful, it nevertheless gives claim to a general average contribution. The second case is where the peril has, in spite of the sacrifice, had its full effect, and the loss, which it was intended by the sacrifice to avert, has nevertheless been sustained. This case raises questions of nicety and doubt. It is clear, indeed, that if both ship and cargo entirely perish

(*r*) Ralli *v.* Troop (1894), 157 U. S. 386. The case was also decided on the ground that the sacrifice was not a voluntary act of the master, but a compulsory one by the port authorities (see *ante*, s. 909, n. (*i*)); and the Court seems also to have considered that the general safety must not only be an object, but the sole object of the sacrifice. On this point, however, the same Court in McAndrews *v.* Thatcher ((1865), 3 Wall. at p. 370) seems to have taken a different view. See Royal Mail Steam Packet Co. *v.* English Bank of Rio (1887), 19 Q. B. D. at p. 374, per Wills, J.

Sect. 912. in spite of the sacrifice, there can be no contribution, because there is nothing left to contribute. The difficulty arises in cases where the ship is lost but the goods or part of them are saved; in such cases, does that which is saved contribute for that which has been sacrificed? The discussion of this question has been reserved to a later part of this chapter, inasmuch as it is here our object to enumerate only the undoubted requisites of a general average loss (*s*).

The loss must be submitted to under the pressure of imminent danger.

913. It is an undoubted requisite of a general average loss that it should have been incurred under the pressure of a real and imminent danger. The sacrifice may have been *bonâ fide* made with a view to the general safety; but it can give no claim to contribution unless that safety shall appear to have been really endangered. I am not bound to make good to another a loss he has intentionally incurred, with a view to my benefit, if such loss was one which a man of ordinary firmness and sound judgment would not, under the circumstances, have submitted to. The sacrifice must have been made under the urgent pressure of some real and immediately impending danger, and must have been resorted to as the sole means of escaping destruction.

"In order to give a claim," says Emerigon, "to a general average contribution, it is not enough that a jettison has been made: that measure must have been forced upon those resorting to it by the fear of perishing" (*par la crainte de perir*). "A panic terror," says the same great writer, "will not excuse the captain who has had recourse to a jettison without being forced to it by real danger" (*t*).

The sacrifice must be resorted to after such due deliberation as circumstances permit.

914. The old sea-laws detail with great minuteness all the forms which ought to be observed by the captain, before proceeding to make any sacrifice for the general safety (*u*). And

(*s*) Cf. ss. 979, 980, *infra*.

(*t*) 1 Emerigon, c. xii. s. 39, pp. 587, 588.

(*u*) Jugemens d'Oleron, arts. 8, 9; Pardessus, Lois Maritimes, vol. i. p. 328; Laws of Wisbuy, arts. 20, 21; *ibid.* p. 475; Consolato del Mare, arts. 97, 109, of the Italian translation, cc. 54, 56, of the original. See Pardessus, Lois Maritimes, vol. ii. pp. 104—112.

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in more modern times Stevens gave it as the practical rule to be observed, that the master should, if possible, consult the most experienced of the crew and the supercargo, if there be one on board; and then make an entry in his log-book, and immediately on arriving at the first port, note, and, if possible, extend, his protest (*v*).

It is obvious, however, that in those cases of desperate and urgent danger which allow no time for hesitation and discussion, no greater degree of deliberation should be required than may be necessary to rescue the measures resorted to from the reproach of rashness.

"The rule of consulting the crew," says Lord Kenyon, "is rather founded on convenience, and to avoid dispute, than on necessity" (*w*). "A consultation with the officers," remarks Story, J., "may be highly proper in cases which admit of delay and deliberation; but if the propriety and necessity of the act be otherwise sufficiently made out, there is an end of the substance of the objection" (*x*).

The test suggested by Baily seems a very sensible one; viz., that the act must be a judicious one with reference to the state of things at the moment of its performance (*y*). "From this principle," as he very justly observes, "it follows that a consultation between master and crew, or a want of uniformity in the opinions of the crew, does not materially affect the question; and that an act may give rise to general average even where the master orders it in opposition to the wishes of the crew, or a crew perform it in defiance of the orders of the master" (*z*).

(*v*) Stevens, Average, 29.

(*w*) Birkley *v.* Presgrave (1801), 1 East, 228.

(*x*) In Colonial Ins. Co. *v.* Ashby (1839), 3 Peters, S. C. R. 331.

(*y*) Baily, General Average, 19—23.

(*z*) *Ibid.* 21. The concluding words of this sentence are undoubtedly open to criticism. The case of Ralli *v.* Troop ((1894), 157 U. S. 386)—a very learned and exhaustive decision of the Supreme Court of the United States—lays down that it is to the master of the vessel, and to him alone (except in case of his death, disability, or absence), that the power and duty of determining all such questions appertains, on the ground, apparently, that it is he alone who is invested by the owners of the different interests with implied authority

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The sacrifices and expenses must be of an extraordinary nature.

915. It remains to notice another principle, of great importance in determining whether a loss be or be not such as to give a claim to general average contribution, viz., that no such claim can be sustained unless the sacrifices and expenditures out of which it arises were of an extraordinary nature; in other words, unless they were something over and beyond those ordinary duties and ordinary expenses of the navigation to which the shipowner is bound by the nature of the contract between himself and the freighter, and for which he is to be remunerated by the freight. By the contract of affreightment the shipowner is bound to do all that is requisite, in the ordinary course of the voyage, for the safe transport of the goods to their port of delivery (*a*). All expenses, therefore, incurred, and all ordinary manœuvres rendered necessary, for the purpose of so transporting the goods, or keeping the ship in a fit state so to transport them, are a direct consequence of his contract with the freighters, and, being merely within the strict scope of his ordinary duty as shipowner, cannot entitle him to any recompense but that which was his consideration for undertaking such duty, viz., the freight (*b*).

What is extraordinary?

916. For instance, a large clipper ship with an auxiliary screw, while crossing the ocean with a cargo on board, was so injured by collision with an iceberg as to lose all power of sailing. The master made Rio by means of her auxiliary screw. Finding when there that complete repairs would cost several thousands of pounds more than in England, and would entail the unshipping of the cargo and considerable delay, he had sufficient repairs done to her in three days, without taking out the cargo, as would carry her home. He then sailed and arrived in England by means of her auxiliary

to act on their behalf. It is stated to be doubtful whether even a pilot in command has such authority; much less, therefore, a crew. See also Wamsutta Mills *v.* Old Colony Steamboat Co. (1884), 137 Mass. 471.

(*a*) 3 Kent, Com. 208 *et seq.*

(*b*) "En effet," says Boulay-Paty, "toutes ces mesures sont comprises dans l'obligation de transporter la cargaison." Comment. on Emerigon, vol. i. p. 610. See also 2 Phillips, Ins. s. 1281.

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screw, having purchased coals at Rio and again at Fayal at an extra cost to the owner of 1,472*l*. The Court held that the master had done no more than it was his duty to do, and that no part of the expense for coals could be allowed to be general average (*c*).

Blackburn, J., in the course of the judgment of the Court, said: "The shipowners by their contract with the freighters are bound to give the services of their crew and their ship, and to make all disbursements necessary for this purpose. In the case of such a vessel as this, which is equipped with an auxiliary screw, their contract includes the use of that screw, and consequently the disbursements necessary for fuel for the steam engine. Now the disaster which occurred in this case no doubt caused the engine to be used to a much greater extent than would generally occur on such a voyage, and so caused the disbursement for coals to be extraordinarily heavy; but it did not render it an extraordinary disbursement. The case is similar to that of an ordinary sailing vessel in which, owing to disasters, the voyage is unusually protracted, and consequently the owner's disbursements for provisions and for the wages of his crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature" (*d*).

Where, therefore, a vessel met with heavy weather which continued for many days, and the vessel in consequence strained and sprung a leak, and the supply of coals for the donkey engine, which would have sufficed for an ordinary voyage, was exhausted at the pumps, so that spare spars and part of the cargo were afterwards necessarily consumed in making steam for the pumps, and in saving the ship and

(*c*) Wilson *v.* Bank of Victoria (1867), L. R. 2 Q. B. 203. Accord. in respect of coals, Harrison *v.* Bank of Australasia (1872), L. R. 7 Ex. 39.

(*d*) L. R. 2 Q. B. 212.

Sect. 916. cargo; this loss was held to be chargeable as general average (*e*).

917. It is often very difficult in practice to draw the line accurately between what shall be considered ordinary and what extraordinary expenses and sacrifices. Further instances of the application of this principle, and of the difficulty in applying it, will be found later on in this chapter; meanwhile it will suffice to cite the following as a good instance of that extraordinary kind of sacrifice which would everywhere be acknowledged to give a claim to general average contribution.

Sacrifice of boat in order to save ship and cargo from imminent capture.

The captain of a French ship, who had been chased all day by an enemy, who was rapidly gaining on him, at nightfall deliberately launched his long boat, fitted her with a mast and sail, fixed a lantern in her mast head, and set her adrift; at the same time he hauled down the ship's lights and altered her course. The long boat, followed by the enemy, drifted away before the wind and was lost; the ship, by means of this manœuvre, escaped. The loss of the boat under these circumstances was held to be a general average loss, having been an extraordinary sacrifice, intentionally made for the sake of saving the ship and cargo (*f*).

Where loss caused by fault of the claimant.

918. Another condition to the right to claim contribution has recently been established by high judicial authority, viz., that where the peril giving rise to the claim has been occasioned by the fault of the claimant or his servants, he cannot be permitted to recover from those whose property, though saved by his sacrifice, was yet imperilled by his wrongful act. Thus, in Schloss *v.* Heriot (*g*), to a shipowner's claim for contribution, a plea that the loss was caused by the vessel's unseaworthiness at the commencement of the voyage was held good by Erle, C. J., and Willes and Keating, JJ. And

(*e*) Robinson *v.* Price (1876), 2 Q. B. D. 91; and in Court of Appeal at p. 295; Harrison *v.* Bank of Australasia, *ubi supra*.

(*f*) 1 Emerigon, c. xii. s. 41, p. 606.

(*g*) (1863), 14 C. B. N. S. 59. To the same effect is Cheraw & Salisbury Railroad Co. *v.* Broadnax (1886), 109 Penn. St. 432.

this decision was recently quoted with approval by the Privy Council (*h*) in the discussion of a claim for jettison in consequence of a stranding occasioned by the negligence of the master. But it appears that this doctrine would bar only the claim of the wrongdoer, and not that of other innocent sufferers (*i*); also, that if the contract of carriage exempts the shipowner from liability for the negligence of his servants, his claim for contribution remains unaffected by such negligence (*k*). Sect. 918.

Upon the whole, then, it appears, that before a party interested in a sea-venture can establish his claim to a general average contribution, he must show that the loss he has sustained has arisen, not from any accident, but from some—(1.) Intentional sacrifice, or voluntary expenditure; (2.) Purposely resorted to for the general safety; (3.) Under the pressure of real and imminent danger. It must also appear, (4.) That the sacrifice or the expenditure was judiciously incurred; (5.) That it is not included in those ordinary duties or expenses which are incidental to the navigation of the ship, and are paid out of the freight; (6.) That it was not due to any wrongful act, for which the claimant is responsible (*l*). Recapitulation.

(*h*) Strang *v.* Scott (1889), 14 App. Cas. 601. In America, cf. Hurlbut *v.* Turnure (1897), 81 F. 208. The mere fact that the shipowner, being in fault, cannot maintain an action for contribution against a cargo-owner does not relieve him from liability to contribute towards the cargo-owner's loss. The Strathdon (1899), 94 F. 206.

(*i*) Strang *v.* Scott (1889), 14 App. Cas. 601. And cf. Pacific Mail S.S. Co. *v.* N. Y. Min. Co. (1896), 74 F. 564, a decision of the Circuit Court of Appeals in the United States.

(*k*) The Carron Park (1890), 15 P. D. 203; discussed and approved by the Court of Appeal in Milburn *v.* Jamaica Fruit, &c. Co., [1900] 2 Q. B. 540; Williams, L. J., however, dissented. The law on this point is different in foreign countries. Cf. The Mary Thomas, [1894] P. 108 (Dutch); Hick *v.* London Ass. Co. (1895), 1 Com. Cas. 244 (French).

(*l*) The English law on the subject of general average differs materially from that of foreign countries. The main distinction is that whereas in England there can be no claim for contribution except where the actual physical safety of a particular interest has been in peril, it is sufficient on the Continent and in the United States if extraordinary expense has been incurred with the object of completing the intended adventure. With

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Division of general average losses.

919. Having ascertained the principles on which all claims to general average contribution are founded, the next step is to enumerate the different cases in which these claims may be made good; in other words, to specify the principal instances of general average loss.

All general average losses may be said to arise: 1. From SACRIFICES of part of the cargo, or of part of the ship, for the common safety; 2. From EXPENDITURES incurred with the same object. We will begin with considering those losses which arise out of sacrifices of part of the cargo, and take first the case of jettison, which is the simplest and most perfect instance of a general average loss. Jettison is defined in the Rhodian law to be *jactus mercium factus levandæ navis gratiâ* (*m*), a heaving overboard of the goods in order to lighten the ship. It is the most perfect example of a general average loss, and when made intentionally, for the sake of saving the other interests from imminent danger, is generally admitted as giving a claim to contribution.

Jettison of deck-cargo. No contribution unless cargo so carried in accordance with custom of trade, or unless the shipowner and the owners of the rest of the cargo have agreed that

920. An important exception to the rule of contribution after jettison is in the case of the jettison of goods carried on deck. This is on the ground that they are hindrances to the safe navigation of the vessel, and "their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of incumbrances which ought never to have been there, and not as a sacrifice for the common safety" (*n*). The exception, however, does not apply in cases where, according to the common usage and course of trade on

the object of securing uniformity in all countries, congresses have been held, the history of which will be found in Lowndes on General Average, App. U. (4th ed.). The result was the adoption in 1877 of a set of rules now known as the York-Antwerp Rules. These rules were in many ways altered and added to in 1890, and in their modified form are now known as the York-Antwerp Rules, 1890. These rules, which are set out in Appendix D., are of great importance, as they are very usually incorporated into English policies of insurance. This chapter is, however, mainly concerned with the English law on the subject, apart from any agreement that any particular set of rules shall be taken to apply.

(*m*) Dig. lib. xiv. tit. 2, f. 1.

(*n*) Strang *v.* Scott (1889), 14 App. Cas. at p. 609.

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there shall be contribution in such case.

the voyage for which they are shipped, such cargoes are permitted (*o*), nor does it apply where the parties from whom contribution is sought have agreed impliedly or otherwise to contribute in the ordinary way (*p*).

The above propositions appear to be deducible from various decisions, some of which seem at first sight difficult to reconcile with each other.

Thus, in Johnson *v.* Chapman (*q*), the defendant chartered the plaintiff's vessel to load a full and complete cargo of deals, including a deck load, for a voyage from Quebec to London. There was no custom authorising the carriage of deck cargo in such a voyage. The deck cargo was properly jettisoned during the voyage, and the defendant claimed contribution. The Court of Common Pleas decided in favour of the claim, on the ground that the charter-party contemplated a deck cargo. "Then, immediately you find that the deck cargo is within the contemplation of the parties, you must deal with it as if shipping a deck cargo was lawful. When you have established that it is a deck cargo lawfully there by the contract of the parties, it becomes subject to the rule of general average" (*r*).

921. This decision, however, including the passage above

(*o*) Gould *v.* Oliver (1837), 4 Bing. N. C. 135; 5 Scott, 447; *S. C.* (on claim by shippers against shipowners for the full value of the timber jettisoned), 2 M. & Gr. 208; 2 Scott, N. R. 241; and cf. Royal Exchange Co. *v.* Dixon (1886), 12 App. Cas. 11.

(*p*) According to York-Antwerp Rules, 1890, however, the exception appears to apply to all cases:—"No jettison of deck cargo shall be made good as general average. Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel."

(*q*) (1865), 19 C. B. N. S. 563; 35 L. J. C. P. 23.

(*r*) 19 C. B. N. S. at p. 583; 35 L. J. C. P. at p. 28. The mere knowledge, however, of the shipper that his cargo is being or will be carried on deck, in the absence of an established custom or positive contract to that effect, will not justify the shipowner in so stowing and carrying it. In the event of a jettison of any cargo so carried, however proper in itself the jettison may have been, the shipowner will be liable for the full amount of the loss. In such a case there is no question of general average contribution. Royal Exchange Co. *v.* Dixon (1886), 12 App. Cas. 11.

Sect. 921. quoted, was explained in a later case in the Court of Appeal as only applying to cases where, the cargo-owner and the shipowner being the only parties concerned in, and benefited by, the jettison (such as the case where the shipper is also the charterer), an agreement can be implied from the circumstances of the case that in the event of jettison the ship shall contribute. In Wright *v.* Marwood (*s*) the ship was a general ship belonging to the defendants, who agreed to let to the plaintiffs the upper deck for the carriage of a cargo of cattle from New York to England. It was held by Lord Coleridge, C. J., and Bramwell and Baggallay, L. JJ., that the shipper was not entitled to recover a general average contribution from the defendants for the jettison of the cattle. The Court laid stress on the fact of the ship being a general ship, and on the freight being, no doubt, lower than if the animals had been carried below. Under such circumstances they held it impossible to imply any agreement to pay contribution merely from the fact that the shipper and owner had agreed for cargo to be shipped on deck, and that apart from such an agreement there was no foundation for the shipper's claim.

The same point was referred to by Lord Watson in delivering the judgment of the Privy Council in Strang *v.* Scott (*t*). His lordship is reported to have said that the exception (*i.e.*, the non-liability for contribution in case of deck cargoes) did not apply either (1) in those cases where, according to the established custom of navigation such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship. It is submitted, nevertheless, that not only must the other owners of cargo have consented to such carriage, but they must also have consented under such circumstances as to justify the inference that they intended to take upon themselves the liability to contribute in case of jettison. The passage in Lord Watson's

(*s*) (1881), 7 Q. B. D. 12. (*t*) (1889), 14 App. Cas. at p. 609.

judgment to which reference has been made is an *obiter dictum*, which he might or might not have acceded to in its present form, had the facts of the case been the same as they were in Wright *v.* Marwood. Sect. 921.

Rules as to contribution where deck-cargo is jettisoned.

922. The rules properly deducible from the decisions already referred to appear to be as follows: Firstly, that where a deck cargo is properly carried in accordance with a custom to that effect, a jettison will give the shipper a right of contribution not only from the shipowner, but also from the owners of cargo shipped below. Secondly, that where a cargo is so carried not in accordance with any custom, but merely by agreement between the shipper and shipowner, there is no such right of contribution as against other shippers unless they have agreed to be liable to contribute. "Whatever may be the agreement between the shipowner and the owner of the deck load, the other cargo owners are no parties to it, nor bound to inquire into it, or notice it, as they are bound to take notice of a custom" (*u*). Whether or not, in such a case, there is a right of contribution from the shipowner will depend on the proper construction of the contract under which the goods carried on deck and jettisoned were so carried. Thirdly, in the case of a chartered ship where the shipper and the charterer are the same, the right of contribution for deck cargo against the ship no doubt exists unless it be clearly negatived by the contract (*x*).

Effect of certain stipulations in charter-party or bill of lading limiting carriers' gene-

923. An interesting point in this context arose in Burton *v.* English (*y*). This was an action by the shippers of a cargo of iron and wood from the Baltic to London, to recover from the shipowners a general average contribution for the jettison

(*u*) Wright *v.* Marwood (1881), 7 Q. B. D. at p. 68.

(*x*) For the American law, see Wood *v.* Phœnix Co. (1881), 8 F. 27; The Mary and Eva (1881), 6 F. 628. The rule of the Association of Average Adjusters in this country is to allow contribution for the jettison of a deck load carried according to the usage of trade, and not in violation of the contracts of affreightment. There is an exception to this rule as to cargoes of cotton, tallow, acids, and some other goods. See Appendix E.

(*y*) (1883), 12 Q. B. D. 218.

Sect. 923. ral liability. Do they affect claims for general average contribution?

of the timber which, in virtue of a custom in the trade, had been carried on deck. The defence was that under a clause of the charter-party "the steamer shall be provided with a deck load if required at full freight, but at merchant's risk;" the shipowner was not liable. The Court of Appeal held, upon the construction of the document, that the words "at merchant's risk," having been introduced in favour of the shipowners, only limited their liability as carriers, and were not strong enough to absolve them from the claim for a general average contribution. Very similar points had previously been decided by Blackburn and Lush, JJ., in Schmidt *v.* Royal Mail SS. Co. (*z*), and by Lush, J., in Crooks *v.* Allan (*a*). In the former of these cases it was held that an exception in a bill of lading of fire on board, and its consequences, only relieved the shipowners from their obligation to deliver under the circumstances to which the exception related, and did not affect their liability to make a general average contribution. The latter case was to the same effect.

No contribution where jettison due to the dangerous character of the goods shipped.

Another exception to the right to contribution in case of jettison is where the owner of the goods jettisoned has himself been to blame for the danger necessitating the sacrifice, as, for example, by shipping dangerous goods. In such a case the shipper must himself bear the loss, and cannot take advantage of his own wrong so as to throw any part thereof on the shoulders of innocent parties. This is in accordance with a general principle which has already been noticed (*b*).

Contribution for goods for which there is no bill of lading.

The fact that there is no bill of lading for goods jettisoned does not, by English law, make any difference to the right to contribution (*c*).

Rules as to contribution where part of

924. Where, in the course of the voyage, in order to save a ship from foundering, to float her after stranding, or to

(*z*) (1876), 45 L. J. Q. B. 646.

(*a*) (1879), 5 Q. B. D. 38.

(*b*) *Ante*, s. 918. Cf. Schloss *v.* Heriot (1863), 14 C. B. N. S. 59; Pirie *v.* Middle Dock Co. (1881), 4 Asp. M. L. C. 388, and cases there cited.

(*c*) Arnould (2nd ed. p. 904) stated the contrary, but only cited foreign codes in support of his statement. The practice here is as stated in the text.

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enable her to make a port of distress, part of the cargo is put into boats and lighters, and lost before reaching the shore, such loss gives a claim to general average contribution (*d*); for it is regarded as though it were a jettison (*proinde si jactura facta esset* (*e*), being an intentional exposure of the goods to imminent and extraordinary risk, with a view to the ship's safety (*f*).

Goods is exposed in lighters.

If, however, the goods be thus hazarded in the ordinary course of the voyage, and not in order to rescue the ship from any extraordinary or impending danger, as where, in the usual course of the navigation, they are necessarily sent on in boats or lighters from the ship to the port of destination, their loss gives no claim to contribution (*g*).

If, in the case first supposed, the boat employed for the purpose of taking out the goods, itself belong to the ship, it must, as well as the goods, be contributed for, if lost (*h*).

Questions as to contribution in case of goods thus exposed.

If, however, in the same case, the ship and rest of the cargo be lost, no contribution is made in respect thereof by the goods thus exposed for the general welfare, even though they themselves arrive safe (*i*); for as the ship was not intentionally sacrificed to rescue the goods from peril, they cannot be liable to contribute to such loss (*k*). If the goods so exposed

(*d*) 1 Emerigon, c. xii. s. 41, p. 599; 4 Benecke, System des Assecuranz, 56, 57; Abbott on Shipping, 5th ed. p. 346; 13th ed. p. 630, cited by Cresswell, J., in Hallett *v.* Wigram (1845), 9 C. B. 580, 608, and by Mathew, J., in M'Call *v.* Houlder, Bros. (1897), 2 Com. Cas. 129, 132. And see, too, Royal Mail Co. *v.* English Bank of Rio (1887), 19 Q. B. D. at p. 372, per Wills, J.; Baily, 60; Lowndes, s. 15. Cf., however, the American case of L'Amerique (1888), 35 F. 835, where, under special circumstances, no contribution was allowed except for the expenses of unloading.

(*e*) Dig. lib. xiv. tit. 2, f. 4.

(*f*) Benecke, Pr. of Indem. 178.

(*g*) 2 Valin, tit. des Avaries, 459; Benecke, Pr. of Indem. 178; Phillips, s. 1288.

(*h*) 1 Emerigon, c. xii. s. 41, p. 599.

(*i*) Code de Commerce, art. 427; Benecke, Pr. of Indem. 212, 213. The United States Circuit Court of Appeals seems to have decided the contrary in Reliance Mar. Ins. Co. *v.* N. Y. & C. Mail S.S. Co. (1896), 77 F. 317. This decision, even if correct according to American law, is certainly inconsistent with that of this country.

(*k*) Arnould (2nd ed. p. 906) here added, "neither, in case the ship is lost, but the cargo or a portion of it saved, can the portion so saved be

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are properly jettisoned in their transit from the ship to the shore, their owners can claim contribution from the owners of the other goods similarly exposed, as well as from the ship and cargo remaining on board (*l*).

If, however, the damage to the goods so exposed be fortuitous, the position seems to be that there should be contribution for the loss from the interests for whose safety the exposure took place, but not from other goods similarly exposed.

Goods given by way of composition to pirates, &c.

925. If goods be voluntarily and without fraud given up to pirates, &c. by way of composition, the loss thence arising is a general average loss; for the goods in such case are as much sacrificed for the general safety as though they were jettisoned (*m*). If forcibly taken by pirates or plunderers, it is, of course, otherwise, there being in such case no voluntary submission to loss (*n*).

Damage done by jettison.

On the ground that the accessory follows its principal, all damage necessarily caused to other goods, or to the ship, by the jettison, itself gives a claim to general contribution (*o*). Thus, if holes are cut in the ship in order to get goods or stores out for the sake of lightening her (*p*); or if goods, after being brought up on deck, in order that other less valuable goods stowed beneath them, may be jettisoned, are themselves washed overboard or damaged by the sea, the loss is, in both cases, a general average loss (*q*). So, where water is thrown down a ship's hatches to extinguish an accidental fire, and other goods are damaged thereby (*r*).

liable to contribute for the goods transhipped," citing Benecke, Pr. of Indem. 213. This view, however, is not concurred in by the present editors.

(*l*) 2 Phillips, Ins. s. 1289.

(*m*) Hicks *v.* Palington (1590), Moore, 297. From Lowndes' Comparative Table, p. xxxiii. it appears that the Belgian Code is alone in treating such a loss as particular average.

(*n*) Nesbitt *v.* Lushington (1792), 4 T. R. 783.

(*o*) See, as to the practice in this country, Lowndes, 67. As to foreign countries, see Comparative Table, and passages in Lowndes' text there referred to. Cf. also 2 Phillips, s. 1286.

(*p*) Benecke, Pr. of Indem. 177, 178; Stevens on Average, 12; Lowndes, *ubi supra*.

(*q*) Benecke, Pr. of Indem. 213.

(*r*) Whitecross Wire Co. *v.* Savill, C. A. (1882), 8 Q. B. D. 653; Papa-

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On the same principle the freight, which but for the jettison the shipowner would have received for the goods jettisoned, must be made good to him by a general average contribution (*s*).

Freight of goods jettisoned.

Goods jettisoned still belong to their former owners, and, if recovered from the sea, may be reclaimed by them on paying the expenses of salvage. *Res jacta domini manet nec fit adprehendentis, quia pro derelicto non habetur* (*t*).

Property in goods jettisoned.

926. In cases of absolute necessity, when the master, being in a foreign port, has no other means whatsoever of raising money, he may sell part of the cargo for the purpose of procuring funds.

General average losses.—Sale of part of cargo.

This right is recognized and sanctioned alike by the earliest and most recent codes of maritime law (*u*), and by the jurisprudence of our own country (*x*).

When allowed.

In such cases, according to the expression of Lord Stowell, "a portion of the cargo is abraded for the common benefit"; and the transaction is considered to be in the nature of a compulsive loan from the owner of the goods so sold for the benefit of all concerned (*y*).

Nature of the transaction.

If the goods are sold by the shipowner merely to defray the expenses of those necessary repairs of the ship which he himself is in duty bound to provide by the very contract of affreightment, then, upon the principles already developed, the loss incurred by these sales cannot be made the subject of

The loss arising out of such sale gives no claim to contribution where the sale is effected to supply the

yanni *v.* Grampian S.S. Co. Ld. (1896), 1 Com. Cas. 448. The general question of contribution for damage done in quenching fire is noticed *infra*, s. 936. The York-Antwerp Rules, 1890, agree on this point with our law.

(*s*) Benecke, Pr. of Indem. 178; Phillips, Ins. s. 1287.

(*t*) Dig. lib. xiv. tit. 2, f. 8; 1 Emerigon, c. xii. s. 40, p. 596.

(*u*) See the Judgments of Oleron, art. 22, 1 Pardessus, Lois Maritimes, 339; Laws of Wisbuy, art. 39, cited as 44, in 1 Pardessus, 480; the Consolato del Mare, c. 105 of the Italian translation; c. 62 in the original Catalan; see 2 Pardessus, Lois Maritimes, 110; see also the Co. de Com. art. 234; 2 Nolte's Benecke, 605.

(*x*) See the famous case of The Gratitudine (1801), 3 C. Rob. 240; Maclachlan, Shipping, 159 *et seq.*

(*y*) See the judgment of Lord Ellenborough in Powell *v.* Gudgeon (1816), 5 M. & S. 431.

Sect. 388. a general average contribution, but must be made good by the ship-owner to the owner of the goods so sold.

Ordinary expenses of the voyage.

347. Thus, where a ship was driven back into port to repair the accidental damage done to her by a storm, and the master, having no other means of raising money, sold part of the cargo to defray the expense of the repairs, the Court held that the owners of the goods so sold could not be called upon to contribute a rateable proportion of the loss they had so incurred, but must make their claim against the ship-owners alone (*a*).

Doubt as to whether loss by forced sale of cargo to repair a port of refuge is or is not general average.

From this decision, together with the various authorities cited below, Arnould (*b*) gathered that a claim to general contribution would be held to be established wherever the sale was manifestly resorted to with a view to repair losses which themselves arose from general average, but not when the losses were themselves particular average (*c*). It is submitted, however, that since the decisions of the Court of Appeal and House of Lords in Atwood *v.* Sellar (*d*) and Svendsen *v.* Wallace (*e*), which are dealt with at length later, the test must be that established by those cases; viz., was the loss which was due to the forced sale, though not itself a general average sacrifice because incurred at a time when the interests were in physical safety, nevertheless occasioned by a previous general average sacrifice? A rigid application of the principles laid down in Svendsen *v.* Wallace

(*a*) Powell *v.* Gudgeon (1816), 5 M. & S. 431; *S. P.* in Sarquy *v.* Hobson (1827), 4 Bing. 131; accord. Hallett *v.* Wigram (1845), 9 C. B. 586; 19 L. J. C. P. 281; Dobson *v.* Wilson (1813), 3 Camp. 479.

(*b*) 2nd ed. p. 909.

(*b*) Hallett *v.* Wigram (1845), 9 C. B. 586; Stevens on Average, 15; Benecke, Pr. of Indem. 261—275; and *cf.* the 22nd article of the Judgments of Oleron; Pardessus, vol. i. p. 339, which in this respect is followed almost verbatim by the Laws of Wisbuy, art. 39 (art. 44 of 1 Pardessus, Lois Maritimes, 480), and the Consolato del Mare, c. 105, of the Italian translation, 62, of Pardessus, vol. ii. p. 110. If the price of goods at the port of sale be higher than at the port of destination, the former is the sum at which they must be paid for. Richardson *v.* Nourse (1819), 3 B. & Ald. 237.

(*c*) 5 Q. B. D. 286.

(*d*) 13 Q. B. D. 69; 10 App. Cas. 404.

might necessitate the conclusion that the loss occasioned by the forced sale of the cargo was due to the master's election to do the repairs in that port, so as to earn his freight. On the other hand, it might be urged that such loss ought to be regarded as simply a part of the cost of making good the prior general average sacrifice. The point can hardly at present be said to be free from doubt. Sect. 927.

928. If part of the ship be sacrificed for the general safety, it is contributed for in general average (*e*). Thus, masts cut away, anchors heaved overboard, cables cut, guns and ships' stores jettisoned in order to save the whole adventure, are everywhere the subjects of general average contribution (*f*). Sacrifice of part of the ship.

If a mast be carried overboard by the wind, it is, of course, only a particular average loss; if, however, a mast or spar be snapt or sprung by the wind, and left hanging in the rigging, so that, in order to save the ship and cargo, it becomes necessary to cut away entirely both the mast and the rigging and throw both overboard, the damage caused by the act of so cutting them away is a general average loss, and is to be contributed for to the extent of the value of the mast and rigging as they lay after the accident (*g*). Masts or spars cut away.

929. There must, however, always be an intention to sacrifice something of value. Hence the cutting away of wreck, consisting, for instance, of undamaged rigging and sails attached to a mast which has been blown over the ship's side, is not allowed by adjusters as a general average sacrifice, unless it appears that had the wreckage not been cut away it might have been recovered and been of some value (*h*). Where what is cut away is mere wreckage, what claim for contribution?

(*e*) 1 Emerigon, c. xii. s. 41, p. 606.

(*f*) Co. de Com. art. 400; German Code, art. 702; and see the laws of other foreign countries stated in the Appendices to Lowndes, Gen. Av.

(*g*) 1 Emerigon, c. xii. s. 41, p. 606; Benecke, Pr. of Indem. 183; Stevens on Average, 15.

(*h*) By York-Antwerp Rules, 1890 (rule iv), "Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea peril, shall not be made good as general average." The

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[illegible]

[illegible] a ship was sinking and a part of it was to go [illegible] with a chance it goes and says [illegible] is a ship which must give way in a minute or two. While in the meantime by throwing [illegible] the ship the vessel is safe the danger and if the ship were not [illegible] it would be very difficult to say that that was anything more than waste. A lawyer would [illegible] a matter of pure law that all rubber and [illegible] waste. But what I say is if it was certainly lost if not immediately if the act of cutting the rope was only hastening the moment at which it would be lost, you would properly call that waste, and you would not say it was general average. The reason given is because you cannot keep it. There is no intentional sacrifice in cutting it away. You must lose it, and the losing it a minute or two sooner can make all the difference if its being great injury or not: but you cannot help losing it."

In Shepherd v. Kottgen [j] the ship "Eclair" with a general cargo on board, bound for Hong Kong, encountered a heavy storm between Sully and Lisbon, which carried away the starboard main rigging. After that the mainmast was working violently, and threatened to open the ship or rip open the deck. As soon as the starboard rigging was gone, and could not be repaired in consequence of the weather, it was seen that the mast was gone: it was as good as a wreck. In these circumstances the mate, by the master's orders, cut away the port main rigging, and the mast went overboard, this event being accelerated by that operation to the extent of a minute or two. The action was by the shipowner against one of the cargo owners for a general average contribution.

On appeal, Bramwell, L. J., said: "The mast was in such a state that it must have been lost whether the vessel got

matter is fully discussed by Lowndes (s. 27). In America no contribution is allowed for wreck. The Adele Thackera (1885), 24 F. 809.

(i) Johnson v. Chapman (1865), 35 L. J. C. P. 23, 26—29.

(j) Shepherd v. Kottgen 1877), 2 C. P. D. 578; and on appeal, ibid. 585. Cf. Montgomery v. Indemnity, &c. Co., [1901] 1 Q. B. 147.

safely to port or not. Consequently there was no sacrifice of it when it was cut away, and the plaintiff has no claim for contribution." Sect. 929.

Brett, L. J., in the same case, stated the question in point of form thus:—"If anything on board a ship which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average;—or thus:—Where, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed, that is to say, there is no sacrifice;—or thus:—There is nothing in respect of which a general average contribution could be claimed, because the thing in respect of which the contribution is claimed was, when the act relied upon was done, of no value whatever to the owner (*k*)."

930. The principle above illustrated has been said to be applicable to cargo when in a state of wreck—that is to say, when it is adrift in the hold, and consequently a source of such danger that it is necessary to throw part or the whole of it overboard. A very similar point arose in the case already referred to (*l*), where it was contended that no contribution should be allowed in respect of the jettison of certain timber loaded on deck which, having broken loose and become an Wreckage of cargo.

(*k*) Shepherd *v.* Kottgen (1877), 2 C. P. D. 590. Other instances of losses which are disallowed on this principle by average adjusters in this country are given by Mr. McArthur (pp. 193—196). See, too, Iredale *v.* China Traders Ins. Co., [1899] 2 Q. B. 356; [1900] 2 Q. B. 515 (C. A.), where a claim for contribution in respect of loss of freight upon a cargo of coals was disallowed on the ground that the coals were in any event doomed to destruction, and could under no circumstances have been carried to their destination.

(*l*) Johnson *v.* Chapman, *ubi supra*.

Sect. 930. impediment to the navigation of the vessel, had therefore been thrown overboard. The Court, however, held that inasmuch as the cargo was, except for a little wetting with salt water, just as valuable immediately prior to the jettison as it ever had been, and was at that time in no sense lost and irrecoverable property, there was nothing in its condition to disentitle its owner to contribution. On the same reasoning there would appear to be no ground for disallowing contribution in respect of cargo in the hold jettisoned under similar circumstances.

Cables cut or anchors abandoned.

931. If cables are cut or anchors abandoned in order to avoid any impending peril, as for the purpose of putting to sea in order to escape a lee shore in a gale of wind, this is a general average loss (*m*).

Loss incurred by anchoring in a foul bottom in an unusual place of anchorage.

Where the ship, in order to avoid capture, or a lee shore, casts anchor in a foul and rocky bottom in some unusual place of anchorage, and the cable is consequently chafed asunder by the friction, or the anchor so firmly wedged that it cannot be weighed, it was formerly a subject of great discussion, especially among the German lawyers, whether the damage thus occasioned was a general average loss. On principle, as the damage thus incurred was not intended or anticipated as the result of the act, as it was directly caused not by the agency and will of man, but by the force of the elements, Arnould (*n*) thought that it should not be considered a general average loss.

If, in similar circumstances, the ship is compelled to cut her cable, from the impossibility of weighing the anchor, the loss thence arising will, it seems, be either general or particular average, according to circumstances; if cut in order merely to enable the ship to pursue her voyage, and not under the pressure of any urgent peril, it is particular average; if, in order to prevent her drifting on a lee shore, or to avoid capture, it is general average: the reason being,

(*m*) 2 Phillips, Ins. s. 1295; Baily, General Average, 67; Birkley *v.* Presgrave (1801), 1 East, 220.

(*n*) 2nd ed. p. 911.

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that in the last case there is, and in the first there is not, an immediately impending danger to justify the sacrifice (*o*).

Loss arising from the appropriation of part of ship and tackle to an extraordinary purpose.

932. If any part of the ship or her tackle be applied for the common safety to some purpose different from its ordinary use, the loss thence arising is a general average loss, as if the engines of a steamship be damaged while being worked ahead and astern, in order to get the ship off a bank (*p*), or spars are cut up to construct a rudder, or sails and cordage used to stop up a leak (*q*), or to keep down a leak by using them as fuel for the donkey engine (*r*).

Thus, where, in order to prevent a ship which was lashed to the head of a harbour pier from being drifted thence by the fury of a storm, and sunk on the bar of the harbour, the master cut the cable of his best bower anchor, and with that fastened her to the pier, it was held that the damage thereby done to the cable was a general average loss (*s*); so too, where the master, impelled by necessity, cut away his cable from the anchor to act as a hawser (*t*).

Damage done to one ship in

933. Arnould considered (*u*) that if, with a view to the

(*o*) Benecke, Pr. of Indem. 191; Phillips, Ins. s. 1295; Lowndes, s. 28.

(*p*) The Bona (C. A.), [1895] P. 125. The shipowner was also held entitled to contribution for the extraordinary consumption of coal while the engines were so worked. The facts of this case are more particularly noticed *infra*, s. 936. Cf. also Internat. Nav. Co. *v.* Atlantic Mut. Ins. Co. (1900), 100 F. 304.

(*q*) Phillips, Ins. s. 1299; Baily, General Average, pp. 73, 74.

(*r*) Harrison *v.* Bank of Australia (1872), L. R. 7 Ex. 39; Robinson *v.* Price (1876), 2 Q. B. D. 91, 295 (C. A.). And cf. Wilson *v.* Bank of Victoria (1867), L. R. 2 Q. B. 203, the facts of which case are set out in s. 916, *supra*. By the York-Antwerp Rules, 1890 (rule ix.)—"Cargo, ship's materials and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average." See also Lowndes, s. 14.

(*s*) Birkley *v.* Presgrave (1801), 1 East, 219.

(*t*) Marsham *v.* Dutrey, Select Cases of Evidence, 58; 2 Marshall, Ins. 546.

(*u*) 2nd ed. p. 912, citing Casaregis, Disc. 46, No. 45; Ordinanzas di Bilbao, c. 20, art. 21; Azuni, Dritto

Sect. 933. order to save another.

general safety of ship and cargo, it becomes necessary to damage and destroy another ship, or any part thereof, the loss thereby incurred must be made good by a general average contribution. Thus, if a number of ships are lashed together, and one takes fire, and the crews of the others unite in scuttling the burning ship for the safety of the rest, the loss of the ship so sunk seemed to him to be a general average loss to which all those saved thereby must contribute; and similarly if a crew, for the safety of their own ship, cut the cable of another.

There must be a community of adventure.

But there is no judicial authority for this view. And it is clearly not comprehended within that part of the definition of a general average sacrifice, which requires a sacrifice of part of the interests exposed to risk in one maritime adventure for the sake of the remaining interests similarly exposed in the same adventure. The whole subject has been recently discussed in two decisions of the Supreme Court of the United States. In Ralli *v.* Troop (*x*), it was shown that both authority and principle were opposed to Arnould's view. And in The J. P. Donaldson (*y*) a similar point was decided. The facts were that a steam-tug, while towing two barges, was overtaken by a violent storm and driven with her tow on a lee shore, so as to be in imminent peril of being lost. Eventually the master of the tug was compelled to cut the tow-line, the result being that the barges were wrecked, but the tug was enabled to reach a port of safety. It was held that the barge-owners had no general average claim for the loss, inasmuch as there was no sacrifice of any common interest. The Court refused to consider that the contract of towage created such a connection between tug and tow as to make the two a single maritime adventure.

Marittimo, c. iii. art. 2, vol. ii. p. 169, ed. 1795; and 2 Phillips, s. 1311.

(*x*) (1894), 157 U. S. 386.

(*y*) (1896), 167 U. S. 599. Cf. also Pacific Mail S.S. Co. *v.* N. Y. Min. Co. (1896), 74 F. 564, with which should be contrasted the curious decision in Reliance Mar. Ins. Co. *v.* N. Y. Mail S.S. Co. (1896), 77 F. 317.

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Sails let go to right a ship when on her beam ends.

934. Sails, deliberately let go in order to right a vessel when she is on her beam ends, ought, on principle, to be made good by a general average contribution, for the loss of the sails in such case is the direct, immediate, and intended result of extraordinary sacrifice made for the general safety as the only means of escape from imminent danger (*z*).

Damage to sails or spars due to crowding a press of sail.

But if sails or spars be carried away by the wind (*a*), in consequence of crowding sail to escape an enemy or a lee shore, this is not a general average loss in this country. A merchant ship had struck to a privateer, which, from the wind blowing fresh, was unable to board her: the merchantman, by hoisting an extraordinary press of sail, escaped, but in so doing was much strained and injured, and carried away her mainmast. The damage thus occasioned was held not to be a general average loss (*b*).

The Cour Royale of Rennes in the year 1822 came to the same decision in France, with regard to sails carried away in attempting to escape a lee shore. Boulay-Paty cites both cases with approbation, and gives the true reason on which they are founded—viz., that these manœuvres form part of those ordinary exertions to which the shipowner is bound by his duty to the freighters (*c*).

Damage done to a ship by fighting.

935. Upon the same principle it has been decided in England that damage done to the ship by fighting is not a subject of contribution. Thus, where a merchantman (carrying, however, six guns) was attacked by a privateer, and after a gallant resistance beat her off, but had two of her

(*z*) Benecke, Pr. of Indem. 185; Baily, Gen. Av. p. 64.

(*a*) According to the York-Antwerp Rules, 1890 (rule vi.)—"Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground, or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo and freight, or any of them, by carrying a press of sail shall be made good as general average." And a similar rule of practice has, apart from the York-Antwerp Rules, been adopted by the Association of Average Adjusters; see Appendix E.

(*b*) Covington *v.* Roberts (1806), 2 B. & P. N. R. 378.

(*c*) Boulay-Paty on Emerigon, vol. i. p. 620.

Sect. 935. men killed, several wounded, and received besides great damage from the enemy's shot and expended a considerable quantity of ammunition: the Court held, that neither the expense incurred in curing the wounded sailors, nor the cost of repairing the damage so received, nor the waste of the ammunition so expended, was a subject of general average contribution (*d*). Gibbs, C. J., said, "The measure of resisting the privateer was for the general benefit, but it was no part of the adventure. No particular part of the property was voluntarily sacrificed for the safety of the rest (*e*); the loss fell where the chance of war directed it, and where, therefore, in point of justice, it ought to fall" (*f*): at Nisi Prius the same learned judge had said, "I cannot distinguish this from the case of a ship carrying a press of sail to escape an enemy" (*g*).

With regard to a ship of war, indeed, it is obvious, that the damage caused by fighting is no more than an ordinary sea risk,—a loss caused by the perils insured against in the usual and ordinary course of the ship's duty as an armed vessel (*h*), and not an extraordinary measure resorted to for the general benefit; but with regard to a merchant vessel resorting to the measure of resisting a vessel of superior power as a desperate and only means of saving both ship and cargo from capture, the loss thence arising appears, on principle, a fair subject for general average contribution: it is a loss which is the direct and anticipated result of an extraordinary measure resorted to as the only means of saving the whole adventure from imminent peril; and ought not, it should seem, to be regarded as falling within the scope of those ordinary duties of the navigation to which the owner is bound by his contract with the freighter (*i*).

(*d*) Taylor *v.* Curtis (1816), 6 Taunt. 608; 2 Marsh. R. 309; *S. C.*, 4 Camp. 334; Holt, N. P. 192.

(*e*) 6 Taunt. 623.

(*f*) 2 Marsh. R. 319.

(*g*) 4 Camp. 325.

(*h*) 1 Emerigon, c. xii. s. 41, p. 610.

(*i*) Stevens admitted that there should be a distinction made between the two cases, but considered that even in the case of a merchant ship the loss so incurred would be not general but particular average (Aver-

Sect. 936.

Abnormal use of engines and of coal.

936. The cases above cited, and the principles illustrated, were reviewed and discussed in a recent case where a steamship took the ground while leaving Galveston harbour, and was only rescued from a position of imminent peril by an abnormal use of her engines, coupled with an extraordinary consumption of coal. A claim was made for contribution in respect of the damage to the engines and the cost of the coal, against which it was argued, upon the authority chiefly of Covington *v.* Roberts (*j*), that there was nothing abnormal in the nature of the user of the ship's appliances, though the circumstances were no doubt extraordinary. It was held, however, that to use engines by working them ahead and astern while the vessel was fast on a bank, instead of being afloat, was a use for which they were never intended, and that the engines having been intentionally put to such a use in order to rescue ship and cargo from danger, both the injury to the engines and the extra coal consumed must be contributed for (*k*).

Loss of boats.

Boats, when cut away from the ring-bolts, or other usual fastenings, and heaved overboard, are a general average loss (*l*); but if cut away when lashed from the quarters or stern davits, it seems they would not be so, unless an usage were proved in the trade so to carry them (*m*), or under peculiar circumstances.

Damage done to ship or cargo in order to quench a fire.

Where a ship is scuttled in order to extinguish a fire, which threatens the destruction both of ship and cargo, the damage both to ship and cargo gives a claim to contribution (*n*).

age, 36). Baily (Gen. Av. p. 80) agreed with Stevens, but Arnould (2nd ed. p. 914) took a contrary view.

(*j*) *Ante*, s. 934.

(*k*) The Bona, [1895] P. 125 (C. A.). Cf. Lowndes, General Average, s. 34. So, rule vii. of the York-Antwerp Rules, 1890, provides that "damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage."

(*l*) Stevens, Average, 14; Benecke, Pr. of Indem. 187.

(*m*) Blackett *v.* Royal Exch. Ass. Co. (1832), 2 C. & J. 244; see also Lenox *v.* United Ins. Co. (1802), 3 Johnson, N. Y. Cas. 178.

(*n*) Stevens, Average, 42; Benecke, Pr. of Indem. 243; Achard *v.* Ring

Sect. 936. Similarly, too, where, in order to quench such a fire, water is necessarily poured into the hold (*o*). And in the Circuit Court of Appeals in America, damage to cargo caused by the voluntary flooding of a stranded steamer, in order to prevent a total loss from pounding upon a reef, was held to be a general average loss (*p*). But in a case where, in order to extinguish a fire, steam was turned into the hold, and it was impossible to distinguish between the damage due to the accidental fire and the additional damage occasioned by the application of the steam, it was held that no case for general average was made out (*q*).

Loss arising from voluntary stranding, where the ship is afterwards got off, is a general average loss.

937. Where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding was considered by most of the earlier writers to be a matter for contribution. Emerigon, after exhausting all the learning that could be collected on the subject when

(1874), 31 L. T. N. S. 647; 2 Asp. M. L. C. 422; Papayanni *v.* Grampian S.S. Co. Ld. (1896), 1 Com. Cas. 448. Cf. also Ralli *v.* Troop (1894), 157 U. S. 386, where the Supreme Court of the United States decided that there could be no general average claim unless the act of scuttling were the act of the master, and done with the sole object of saving the particular ship and cargo. It is doubtful whether Papayanni's case is consistent with this decision. Mr. Carver, too, thinks it conceivable that a sacrifice, even if made contrary to the will of the master, might give rise to contribution. Carriage by Sea, s. 374.

(*o*) The practice of average adjusters is now in accordance with principle, and, as above stated, qualified only with the proviso that, where the goods affected by the water are themselves on fire at the time when the water is thrown on them, there shall be no claim in respect of the water damage done to such goods. Until the year 1874 the practice was to disallow such claims. The change was due to Stewart *v.* West India Co. (1873), 8 Q. B. 88, 362. Cf. also Schmidt *v.* Royal Mail Co. (1876), 45 L. J. Q. B. 646; Aspinwall *v.* Merchant Shipping Co. (not reported, but referred to in Schmidt's case); Pirie *v.* Middle Dock Co. (1881), 4 Asp. M. L. C. 388; and Whitecross Wire Co. *v.* Savill (1882), 8 Q. B. D. 653. The history of the controversy on this subject is fully given in Lowndes, Gen. Av. pp. 68—78. Cf. the York-Antwerp Rules, 1890, rule iii., *post*, App. D.

(*p*) Pacific Mail S.S. Co. *v.* N. Y. H. & R. Min. Co. (1896), 74 F. 564.

(*q*) Reliance Mar. Ins. Co. *v.* N. Y. & C. Mail S.S. Co. (1896), 77 F. 317.

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he wrote, thus gives the result of the authorities he cites (*r*): "It sometimes happens that, in order to escape an enemy, or to avoid shipwreck, the ship is intentionally run aground in what appears to be the least dangerous spot. The loss thence arising is a general average loss, because its object was the general safety" (*s*).

The rule has been laid down in the same way by Lord Tenterden in this country (*t*), and by Chancellor Kent in the United States (*u*), where it has received the sanction of several decided cases.

Controversy on the subject.

938. Stevens, while admitting all authority to be against him, maintained the contrary, chiefly on the ground that the object in view is not the general safety of the whole adventure, but only the safety of the cargo purchased by the destruction of the ship (*x*).

Benecke, on the other hand, acknowledged that in every case but one the loss arising from voluntary stranding has all the characteristics of a general average loss—"imminent danger, voluntary determination, and a sacrifice" (*y*)—but in the excepted case—viz., where the situation of the ship at the time of the loss is so desperate as to leave no alternative—he thought the loss was not properly general average, because the stranding was inevitable, and therefore not voluntary.

To the objection of Stevens it is a sufficient answer that the intention is not to destroy the ship, but to place both her and the cargo in a situation of less peril, and that the loss is therefore voluntarily incurred for the common benefit.

Benecke's objection, in the case supposed by him, was

(*r*) These authorities are—Consolato del Mare, c. 192, 193 (that is the 150th c. of M. Pardessus; see Lois Maritimes, vol. ii. p. 166); Roccus de Navibus, n. 60; Targa, c. 76, p. 317; Casaregis, Disc. 19, No. 18; Disc. 46, No. 61.

(*s*) 1 Emerigon, c. xii. s. 13, pp. 405, 600.

(*t*) Abbott, Shipping, 349, 5th ed.; p. 643, 13th ed.

(*u*) In the case of Bradhurst *v.* Columbian Ins. Co. (1812), 9 Johnson, N. Y. R. 9. See also the other cases cited in 2 Phillips, Ins., s. 1313; and cf. The Star of Hope (1869), 9 Wall. 203.

(*x*) Average, 34, 35.

(*y*) Pr. of Indem. 219.

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criticised by Arnould (*z*) in the following terms: "If, indeed, the act of stranding be in no degree the result of human agency, then, of course, *cadit quæstio;* but if the will of man was in any, even the least, degree contributory thereto, that is all which is required; and it makes no difference that the pressure of circumstances was such as to prevent that will from being reasonably exerted, except in one particular way. This forced volition ('*volonta violentata dall' accidente del pericolo*') (*a*) is all that is required to give the party making the sacrifice a claim to contribution. Nothing more is requisite than that the act of man should have co-operated with the violence of the elements" (*b*).

Practice in this country otherwise.

In practice, the rule established in this country is to exclude the description of loss from general average (*c*). Though the point has never been expressly decided in our Courts, there seems little doubt that they would hold in conformity with the great body of previous authorities, that, at all events, where the ship is subsequently recovered after a

(*z*) 2nd ed. p. 916.

(*a*) Targa, as cited 1 Emerigon, c. xii. s. 42, p. 588. And cf. the opinion of the Supreme Court of the United States in The Star of Hope (1869), 9 Wall. at p. 233. It is sufficient that the vessel should have been selected to suffer the common peril in the place of the whole of the associated interests. And the fact that the property cast away would inevitably have perished even if it had not been selected to suffer in place of the whole, makes no difference: Sousmith *v.* The J. P. Donaldson (1884), 21 F. 671.

(*b*) "Que le fait de l'homme ait concuru avec le cas fortuit:" 1 Emerigon, c. xii. s. 42, p. 588. The case, in fact, exactly falls within that class of actions which the scholastic philosophy designated as mixed, *i.e.*, rather voluntary than involuntary, though partaking of the nature of both. Thus Aristotle, in treating of the question of free-will, expressly instances jettisons (τὰς ἐν τοῖς χειμῶσιν ἐκβολὰς) as falling within the class of actions that ought rather to be called voluntary than involuntary, because, although no one would resort to them unless forced by circumstances, yet they are objects of choice at the time they are resolved on, and the necessary steps taken towards carrying them into effect are acts of free volition: Ethics, lib. iii. c. i.

(*c*) Baily, General Average, 41, 75, 76. And by the Rules of Practice adopted by the Association of Average Adjusters it is declared that "the custom of Lloyd's excludes from general average all damage to ship or cargo resulting from a voluntary stranding. This rule does not necessarily exclude such damage as is done by beaching or scuttling a burning vessel to extinguish the fire."

voluntary stranding, so as to be able to pursue her voyage, the loss arising therefrom gives a claim to a general average contribution. Sect. 938.

939. Where, however, the ship is lost in consequence of the stranding, but the cargo saved, does that which is so saved contribute in general average for the loss of the ship? Where the ship is lost by the voluntary stranding, but the cargo saved, is there any contribution?

This is a question on which there has been a great diversity of opinion among legislators and jurists (*d*). The Roman law provided generally that the goods saved should not contribute for the loss of the ship. *Amissæ navis damnum collationis consortio non sarciatur per eos qui merces suas naufragio liberaverint* (*e*). Voet, however, in commenting on this passage, expressly says: "That if the ship be voluntarily run ashore for the common safety, and thus has perished, the goods being saved, contribution is due" (*f*).

The Consolato del Mare (*g*), in case of the ship's being wrecked (*brisé*) by the voluntary stranding, provides that the goods saved shall contribute for the damage done to the ship.

The case is not expressly provided for by the other mediæval sea laws.

Emerigon, after laying down the general doctrine that in case of voluntary stranding the goods saved contribute for the damage done to the ship, adds to it this limitation: "Provided always that the ship shall have been set afloat again; for if the stranding be followed by the wreck of the ship, it is then *sauve qui peut* (*h*).

Bynkershoek disapproves of this doctrine, and holds that the loss of the ship, like the loss of her tackle, is a general

(*d*) See an elaborate account of the state of the question in Pardessus, Lois Maritimes, vol. i. p. 140, and vol. ii. p. 21. See c. xii. Introduction to the Consolato del Mare.

(*e*) Dig. lib. xiv. tit. 2, f. 5.

(*f*) Voetius ad Pandect, *loc. cit.*

(*g*) Cap. 192 of the Italian translation; cap. 150 of the Catalan original; Pardessus, Lois Maritimes, vol. ii. p. 167.

(*h*) 1 Emerigon, c. xii. s. 41, p. 600.

Sect. 939. average loss, where she has been sacrificed by a voluntary stranding for the common safety (*i*).

Law as finally settled in the United States.

940. The question was for some time variously decided in the American Courts, until it was finally set at rest, in 1839, by the judgment of the Supreme Court of the United States, delivered by Story, J., in the case of the Columbian Insurance Company *v.* Ashby (*k*), wherein, after an examination of all the learning on the subject from the Digest downwards, it was decided that a voluntary stranding, followed by a total loss of the ship, but with a saving of the cargo, constitutes, when designed for the general safety, a clear case of general average, in which the owners of the cargo are liable to contribute for the loss incurred by the ship and freight (*l*).

The facts of the case were these:—The brig "Hope," going down Chesapeake Bay, found the weather too bad to proceed to sea, and bore away for a projecting headland in the bay, called Sewell's Point, where she anchored. On the second and following day the gale increased in violence; the brig dragged her anchors from time to time, till finally she struck on the shoals, and, her head swinging round, brought her broadside to the wind and a heavy sea. In this situation the captain, finding no other possible chance of saving the ship and cargo, and preserving the lives of the crew, slipped his cables altogether, and ran the brig ashore, as far up the beach as possible, where, after the storm, she was left high and dry, and there was no possibility of getting her off. The cargo was saved. The Court held, that the owners of the cargo were bound to contribute to the owners of the ship and freight for the loss upon both interests caused by the stranding.

In the course of a very elaborate judgment, Story, J.,

(*i*) Quæstiones Privati Juris, lib. iv. c. 22.

(*k*) 13 Peters, S. C. R. 331.

(*l*) Chancellor Kent, who as a Judge had elaborately expressed a different opinion (in the case of Bradhurst *v.* Columbian Ins. Co.), in his commentaries, states the law to have been finally settled in the United States by the judgment of Story, J. See 3 Kent, Com. 239, note.

thus states succinctly the grounds of the decision:—"The intention is not to destroy the ship, but to place her in less peril, if possible, as well as the cargo. The act is hazardous to the ship and cargo, but is done to escape from a more pressing danger: it is done for the common safety; and if the salvation of the cargo is accomplished thereby, it is difficult to perceive why, because, from inevitable calamity, the danger has exceeded the expectation or intention of the parties, the whole sacrifice should be borne by the shipowner, when he has thereby accomplished the safety of the cargo"(*m*). Sect. 940.

941. In this country there has been no judicial decision on the point. Arnould (*n*) appears to have regarded the principle established in the judgment just referred to as correct.

Lowndes' view on voluntary stranding.

There is, however, a most valuable and exhaustive discussion of the whole question of voluntary stranding in the magnificent work of Lowndes (*o*). Not only are the arguments on all sides carefully explained and considered, but there is an interesting history of the controversy during the early part of the nineteenth century, showing especially what was the old practice at Lloyd's, and how the practice was changed in deference principally to the arguments of Stevens so long ago as 1813. And the views of Benecke, Arnould, and of the American Courts are also carefully weighed. It is impossible here to do very much more than briefly summarise the conclusions arrived at.

Ultimate loss of vessel is immaterial.

The ground may be cleared by pointing out that Lowndes fails to see any principle by which the ultimate loss of the vessel should be allowed to make any difference to the right to contribution. Mr. Carver (*p*) agrees in this view. So do the present editors.

(*m*) This case is well worth consulting in the original report. Those, however, who have not the means of so referring to it, will find the judgment of Story, J., given at length in the 2nd ed. of Phillips, Ins. vol. ii. pp. 111—114. (Not given in the 3rd or 4th eds., see vol. ii. s. 1313.)

(*n*) 2nd ed. p. 919.

(*o*) General Average, 4th ed. pp. 120—146. The question as to whether the ultimate loss of the ship makes any difference is more particularly dealt with in pp. 141—143.

(*p*) Carriage by Sea, s. 387.

Sect. 941. Dealing with the general question, Lowndes classifies the cases which may arise under three divisions: (1) Where it is certain that the vessel must ground somewhere, and the master merely selects the place: (2) Where it is certain that the vessel must, unless stranded, be lost, owing, however, to the imminence of some other peril than that of stranding, such as that of sinking in deep water, burning, capture: (3) Where the vessel is, from some cause or other, in great danger, but loss is not certain. The first case Lowndes does not regard as one of voluntary stranding at all, and he would accordingly allow no contribution in consequence thereof. The second case, and *à fortiori* the third, he regards as cases of voluntary sacrifice, for which contribution should be made.

Inevitableness of danger makes no difference.

942. From these results it is apparent that the author considered that the mere fact that the danger threatening the vessel is inevitable does not affect the matter; otherwise he could not have allowed the second case to be one for contribution. On this point Mr. Carver apparently is of the same opinion. But Mr. Carver (*q*) points out that, if this is so, it is not easy to see why the first case may not also be a case for contribution. The actual stranding in such a case may be voluntary, notwithstanding the fact that some stranding was unavoidable. And if this be so, why should the fact that the unavoidable danger with which the ship is threatened is itself another stranding, debar a claim for contribution, which would have been allowed had such danger been due to some other cause?

Stranding, however, must always be voluntary.

Mr. Carver (*r*) is, however, particularly careful to point out that "to be a general average act, the stranding must really be voluntary, and it does not seem reasonable to call that voluntary which merely anticipates a clear necessity. If the ship is on the point of going on to the rocks, the stranding does not become voluntary because the master chooses to go

(*q*) Carriage by Sea, s. 387. The editors are responsible for their version of Mr. Carver's criticism.

(*r*) s. 388.

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stern on to them instead of broadside, or at one spot rather than at another" (*s*).

As far as the question of voluntary stranding is one of law and principle, the editors are disposed to agree with the views above expressed. It is difficult to see why, when a ship is deliberately run ashore in order to avoid total loss, whatever the impending peril may be, and whatever the result of the act may be, the principle of general average should not apply. As pointed out by another recent writer (*t*), the difficulty seems to be one not so much of principle, as of the application of the principle to circumstances. It may often be a nice question of fact to determine whether in a particular case the stranding was a voluntary one. And a further nice question may often arise, as to the extent to which a vessel has been sacrificed by the stranding. Clearly only the damage due to the stranding should be contributed for; her condition, therefore, before she was run ashore must be taken into account. And if at this time she was virtually a wreck, it appears that the damage to be contributed for should be little, if anything, more than nothing (*u*). But the existence of difficulties of fact such as these affords but a poor argument against the adoption of what appears to be the true principle.

As to the actual practice followed, we have already noticed that, except in the case of fire, the average adjusters of this country allow no general average contribution for damage resulting from a voluntary stranding. The York-Antwerp Rules, 1890 (*x*), seem to steer a middle course between the English practice and the view expressed in our text.

York-Antwerp Rules.

(*s*) As to what amounts to a voluntary stranding, see The Star of Hope (1869), 9 Wall, 203 (United States Supreme Court); and cf. Shoe *v.* Low Moor Iron Co. (1891), 49 F. 252.

(*t*) McArthur, Mar. Ins. 194, note.

(*u*) See Shepherd *v.* Kottgen (1877), 2 C. P. D. 578, 585.

(*x*) Rule V.: "When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally

Sect. 942. Foreign codes, with the exception of that of Belgium, appear to be generally in accord with the principle here supported (*y*).

General average losses—extraordinary expenditures for the common benefit.

943. Having enumerated those cases of general average loss which arise out of sacrifices, we will now proceed to consider those which are founded on expenditures.

General principles the same both as regards sacrifices and expenditures. But in case of expenditures the application of those principles is different.

The same principles apply to cases of general average expenditure as to those of general average sacrifice, and in particular (1) the expenditure must have been of an extraordinary nature, that is to say, something more than one of those ordinary disbursements which are necessary for keeping the ship in a proper condition to transport the cargo; and (2) the expenditure must be due to a voluntary act in the nature of a sacrifice made for the preservation of ship and cargo. It should be borne in mind, however, that there is this peculiarity in all cases of expenditure, *i.e.*, that an expenditure as such cannot be made in order to save anything; that which procures safety is the prior adoption of some extraordinary measure, which involves or leads to expenditure out of the common course, because the measure itself was out of the common course. Instead of dividing general average losses into sacrifices and expenditures, it would, as Lowndes (*z*) points out, be more accurate to say that a general average loss must be the result of a sacrifice, which may either be of the cargo or ship, or may consist in the adoption of some extraordinary course leading to an increased expense. In dealing therefore with extraordinary expenditures, we do not consider whether the expenditure itself was incurred for the joint safety of ship and cargo, but whether the extraordinary course which led to the expenditure was adopted for that purpose.

The expenditure must be strictly due to

944. Another point to be specially noticed in dealing with extraordinary expenditures is that the particular item of

run on shore for the common safety, the consequent loss or damage shall be allowed as general average."

(*y*) See Lowndes' Appendices.

(*z*) Gen. Av. 148.

Sect. 944. the general average act.

expenditure for which contribution is claimed must flow from the extraordinary measure of sacrifice adopted, as effect flows from cause. This matter was discussed in Svendsen *v.* Wallace, where the question was as to what items should be allowed as items of a general average expenditure, which had been incurred at a time when the hour of danger and sacrifice was over. Only those, said Bowen, L. J. (*a*), which can be shown to be part of the loss entailed by some antecedent act of sacrifice. So according to Ulrich (*b*), general average includes all damage or expense which, though not to be foreseen, stands to the sacrifice in the relation of effect to cause, or, in other words, was its necessary consequence. One example of this is given in "Abbott on Shipping" (*c*) in a passage cited with approval by Cresswell, J., in Hallett *v.* Wigram (*d*). "So if to avoid an impending danger, or to repair the damage occasioned by a storm, the ship be compelled to take refuge in a port to which it was not destined, which it cannot enter without taking out a part of her cargo, and the part taken out to lighten the ship on this occasion happened to be lost in the barges employed to convey it to the shore, this loss also being occasioned by the removal of the goods for the general benefit must be repaired by general contribution" (*e*).

Port of refuge expenses.

945. One of the most difficult questions in connection with general average expenditure is as to the incidence of expenses

(*a*) 13 Q. B. D. at p. 89.

(*b*) Grosse Haverei, p. 5, cited by Lowndes, Gen. Av. App. E. p. 426. See also Anglo-Argentine Live Stock Agency *v.* Temperley S.S. Co., [1899] 2 Q. B. 403.

(*c*) 13th ed. p. 630.

(*d*) 19 L. J. C. P. 281; 9 C. B. 580.

(*e*) In the recent case of McCall *v.* Houlder ((1897), 2 Com. Cas. 129), Mathew, J., applied this doctrine so as to make shipowners liable to contribute in respect of damage to cargo occasioned by sea-water which had found its way into the vessel through a broken air-pipe while the vessel was tipped for repairs to her propeller. Inasmuch as nobody knew that the air-pipe was broken when the vessel was tipped, it is doubtful whether the inflow of water by this means can properly be regarded as a natural consequence of the act of tipping. See Lowndes, 35—38. The principle, however, is well established by the authorities quoted above.

Sect. 945. occasioned in consequence of the necessity of taking a ship into a port of refuge, whether for repairs or for shelter merely. There are several points in relation to this subject which cannot yet be said to be finally determined (*f*).

Assuming that a vessel, in consequence of injuries sustained at sea, is obliged, for the safety and preservation of ship and cargo, to put into a port of refuge, expense may be incurred in entering the port, while there, and in leaving it, which may be briefly summarized as follows:—

1. Expense of making and entering the port.
2. Expense of unloading the cargo.
3. Expense of warehousing the cargo.
4. Expense of repairing damage to the vessel.
5. Expense of re-shipping the cargo.
6. Expense of leaving port, outward dues, &c.
7. Expense of crew's wages and provisions while in port.

Perhaps the best way of indicating the difference in principle between the various views on the subject generally will be, before discussing each of the above heads of expenditure severally, to refer shortly to the history of the controversy.

Difference of opinion amongst average adjusters.

946. Until about the year 1878, it had been for a long time the practice of English average adjusters, in adjusting losses in cases where ships had put into port to refit, to treat the expenses of putting into port, and of discharging the cargo, as general average, the expense of warehousing it as particular average on the cargo, and the expense of the re-shipment of the cargo, outward pilotage and port charges, and other expenses incurred in order to enable the ship to proceed on her voyage, as particular average on freight. Whether

(*f*) In practice, the importance of the subject is hardly commensurate with its difficulties. This is due to the prevalence of the custom of inserting into contracts of carriage a provision whereby general average is to be settled in accordance with York-Antwerp Rules. See Appendix D., rules x., xi. and xii. These rules are much more liberal in matters of general average than is the law of this country, especially in having regard to the prosecution of the voyage rather than the safety of the interests as the criterion.

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the necessity of putting into port was itself due to a prior general average act, or to particular average loss or damage, or otherwise, was not deemed to be a material consideration; in all cases the expenses above referred to were similarly treated.

In 1876, however, an eminent average adjuster promulgated the view that the practice above described was wrong in principle, and that all these expenses up to the time when the ship resumed her voyage ought to be adjusted as general average. The result of this opinion was litigation which took shape in the cases of Atwood *v.* Sellar, and Svendsen *v.* Wallace, the former case reaching the Court of Appeal in 1880 and the latter the House of Lords in 1885.

Alteration of practice owing to Atwood *v.* Sellar, and Svendsen *v.* Wallace.

947. In consequence of these decisions, the Rules of Practice of the Association of Average Adjusters were altered to their present form, which is as follows:—

"That when a ship puts into a port of refuge in consequence of damage which is itself the subject of general average, and sails thence with her original cargo, or a part of it, the outward as well as the inward port charges shall be treated as general average, and when cargo is discharged for the purpose of repairing such damage, the warehouse rent and reloading of the same shall, as well as the discharge, be treated as general average (*g*).

"That when a ship puts into a port of refuge in consequence of damage which is itself the subject of particular average (or not of general average), and when the cargo has been discharged in consequence of such damage, the inward port charges and the cost of discharging the cargo shall be general average, the warehouse rent of cargo shall be a particular charge on cargo, and the cost of reloading and outward port charges shall be a particular charge on freight" (*h*).

On comparing the old practice with the new rules as above set forth, it will appear that they agree in including under

(*g*) See Atwood *v.* Sellar. (*h*) See Svendsen *v.* Wallace.

Sect. 947. general average, under all circumstances, all expenses incurred as far as, and including, the discharge of the cargo, and that as regards subsequent expenses they agree as to cases where the necessity of putting into port is occasioned by particular average damage, but differ as to cases where the damage occasioning such necessity was itself the subject of general average.

948. Before proceeding to discuss the various debatable points that arise in connection with this difficult subject, it may be as well to unburden ourselves of those which may now be considered to be settled beyond the reach of controversy.

Expenses of entering port of refuge.

It is undoubted (*i*) that whenever the ship is obliged to put into a port of refuge for the safety and preservation of ship and cargo, however such necessity may have arisen, all inward expenses, such as towage, pilotage and harbour dues, are chargeable to general average. This is because, from all points of view, the peril which *ex concessis* necessitated the putting into port must also necessarily be continuous until the port of safety is reached.

Expense of repairs in a port of refuge.

It is also well established that the question as to the incidence of the expense of the repairs which made it necessary for the ship to seek a port of refuge, must be determined according to the nature of the damage or loss which rendered such repairs necessary. If such damage was in itself a general average loss, the cost of repairing it will be so too. But the cost of repairing damage accidentally caused to the ship by perils of the sea cannot give a claim to contribution, for to pay the cost of such repair is a duty imposed on the shipowner by the very contract of affreightment whereby he has pledged himself to maintain the ship in a fit state for transporting the cargo to its destination (*k*).

(*i*) See Svendsen *v.* Wallace (1884), 13 Q. B. D. 69.

(*k*) Benecke, Pr. of Indem. 194; Arnould, 2nd ed. p. 922. And cf. Hallett *v.* Wigram (1845), 19 L. J. C. P. 281; Walthew *v.* Mavrojani (1870), L. R. 5 Ex. 116. There may possibly be exceptional cases, as where it is necessary for the preservation of the cargo that parti-

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A doubt did once exist on this point both here and in America. It appears, however, to have been mainly due to a misconception of the case of Plummer *v.* Wildman (*l*), and to some unguarded observations which Lord Ellenborough is there reported to have made. This case, however, may well be explained as having been decided on the ground that the repairs were rendered necessary by a sacrifice of part of the ship for the general safety; and the language which Lord Ellenborough is there reported to have used is inconsistent with what he subsequently said in Power *v.* Whitmore (*m*). The rule which is now acted upon both in this country (*n*) and in America (*o*), seems unquestionably to be the true rule, viz., that the expense of repairs rendered necessary by particular average losses sustained by the ship does not give a claim to a general average contribution, but that such claim can only be sustained when the damage to be repaired was in itself a general average loss (*p*).

Warehousing charges, &c.

949. So far there is little difficulty. But as regards other items of expense there has been, and still is, great difference of opinion, and it becomes necessary to consider carefully what are the principles established by Atwood *v.* Sellar and Svendsen *v.* Wallace.

Facts of Atwood *v.* Sellar.

In Atwood *v.* Sellar (*q*) the "Sullivan Sawin," while on a voyage from Savannah to Liverpool, encountered such severe weather that her master was compelled, for the safety of ship and cargo, to cut away the foretopmast. The vessel in consequence of this loss had to put into Charlestown for repairs, in order to effect which it was necessary to discharge a portion of the cargo. After the repairs were completed, the

cular average damage to ship should be repaired at a sacrifice, and in such a case extra cost in doing so at a particular port might be general average. Cf. *ibid.*, and Svendsen *v.* Wallace, 13 Q. B. D. at p. 86, per Bowen, L. J.

(*l*) (1815), 3 M. & S. 482.

(*m*) (1815), 4 M. & S. 141.

(*n*) See per Bowen, L. J., in Svendsen *v.* Wallace, 13 Q. B. D. at p. 86.

(*o*) Lowndes, p. 615.

(*p*) Subject only to n. (*k*), *supra*.

(*q*) (1880), 4 Q. B. D. 342; 5 Q. B. D. 286.

Sect. 949. cargo was reshipped and the vessel proceeded on her voyage. The plaintiffs, her owners, claimed that the whole of the expenses of discharging, warehousing, and reshipping the cargo, and of pilotage, &c. in leaving the port were general average expenses. The defendants, the owners of the goods, while willing to treat the expense of discharging as general average, and themselves to bear the expense of warehousing as particular charges on the cargo, contended that the subsequent expenses were particular charges upon the freight. The Court of Appeal (Bramwell, Baggallay, and Thesiger, L. JJ.) decided in favour of the plaintiffs' claim, holding that it came within the principle underlying the whole doctrine of general average contribution—namely, that the loss, immediate and consequential, caused by a sacrifice for the benefit of cargo, ship and freight, should be borne by all. It was argued for the defendants that the common danger—*i.e.*, the physical danger to which the goods, as well as the ship, were exposed—was at an end as soon as the goods were unloaded, and that as general average ceases at the point of time when the common danger comes to an end, there could be no general average liability for anything that took place after the goods were put out of the ship. The Court, however, seems to have considered that under the expression "common danger" was included not merely danger threatening the physical safety of the ship and cargo, but also the danger of the vessel with her cargo being prevented from prosecuting her voyage. The judgment then continues (*r*): "The going into port, the unloading, warehousing, and reloading of the cargo and the coming out of port, are at all events part of one act or operation contemplated, resolved upon, and carried through for the common safety and benefit, and properly to be regarded as continuous. The shipowner is at least entitled to reship the goods and prosecute his voyage with them; and the expenses necessary for that purpose, being *ex hypothesi* consequent upon a damage voluntarily incurred for the general advantage,

Judgment of Court of Appeal in Atwood v. Sellar.

(*r*) 5 Q. B. D. at p. 290.

should legitimately be the subject of general average contribution, or, to use the language of Lord Tenterden in his work on shipping, 'if the damage to be repaired be in itself an object of contribution, it seems reasonable that all expenses necessary, although collateral to the reparation, should also be objects of contribution; the accessory should follow the nature of its principal.'" The earlier authorities, consisting both of case-law and the opinions of text-writers, are then reviewed, and are declared to be unanimous in favour of the view that in such a case as the present, at any rate where the original cause of loss was itself a voluntary sacrifice, all the expenses claimed in the action were a matter for general average contribution. The Court paid some attention to the distinction that had been drawn between such a case as that before them, and the case where the original cause of loss was a fortuitous peril. Under the circumstances, however, it was unnecessary to express a decided opinion as to whether such a distinction would have entailed any different legal consequences. Sect. 949.

950. The facts of Svendsen *v.* Wallace (*s*) were as follows:— A Norwegian vessel in the course of a voyage from Rangoon to Liverpool sprang a dangerous leak. The captain, in order to save ship and cargo, took refuge in the Mauritius and repaired the damage. When in port it was necessary in order to repair the ship, but not otherwise necessary, to land and warehouse the cargo. When the repairs were completed, the cargo was reloaded and the vessel continued her journey to Liverpool. The plaintiffs were the shipowners, and brought their action against the owners of cargo for a general average contribution. The defendants admitted their liability to contribute to the expenses of unloading, also to pay the whole of the warehouse rent: but the plaintiffs, in addition to what the defendants admitted, claimed contribution in respect of the reloading, and of the port charges, pilotage, and other Facts of Svendsen *v.* Wallace.

(*s*) (1883), 11 Q. B. D. 616; 13 Q. B. D. 69; 10 App. Cas. 404.

Sect. 950. claims subsequent to the reloading. Lopes, J., before whom the action was tried, gave judgment for the plaintiffs for all the disputed items on the authority of Atwood *v.* Sellar, by which he considered the case was governed (*t*). But this decision was reversed by a majority of the Court of Appeal (*u*), and in the House of Lords (*x*) the decision of the Court of Appeal, so far as it declared that the cargo-owner was not liable to contribute towards the reloading expenses, was affirmed. The other points raised in the action were left undecided in the House of Lords.

Svendsen *v.* Wallace in the Court of Appeal. Opinion of Baggallay, L. J.

The judges in the Court of Appeal were Brett, M. R., and Baggallay and Bowen, L. JJ. Of these, Baggallay, L. J. adhered to the judgment pronounced in Atwood *v.* Sellar, and, being of opinion that the principles there laid down applied to the case under consideration, delivered a dissenting judgment in favour of the shipowner's claim on all points. It is important to notice that the learned Lord Justice emphatically rejected the idea that there was any materiality in the distinction drawn between the two cases as to the nature of the injury which made it necessary for the vessel to put into port. In either case the material act of sacrifice is the act of putting into port, however the necessity of doing so may have arisen.

951. The point is illustrated in the following way (*y*) :—"Two ships, A. and B., each on a voyage from a foreign port to Liverpool, and having a valuable cargo on board, encountered a violent storm; the master of A., to avoid a more serious injury, cut away one of his masts; B. sprung a dangerous leak; both, for the safety of ship and cargo, put into a port of refuge to repair the injuries they had sustained; to effect such repairs and to enable the ships to prosecute their respective voyages, it became necessary in the case of each ship to discharge the whole or a portion of her cargo; in addition to the port dues and other expenses incident to

(*t*) 11 Q. B. D. 616.
(*u*) 13 Q. B. D. 69.
(*x*) 10 App. Cas. 404.
(*y*) Per Baggallay, L. J., 13 Q. B. D. at p. 81.

her entering the port, further expenses were incurred in respect of each ship in unloading, warehousing, and reloading her cargo whilst she remained in port, and for pilotage and other charges on leaving the port to prosecute her voyage. Sect. 951.

"The only difference between the circumstances of A. and those of B. was in the nature or character of the injury, which occasioned her putting into port. The cutting away of one of the masts of A. was the subject of general average; in other words, her putting into the port of refuge was occasioned by a general average sacrifice; whilst the putting into port of B. was occasioned by her springing a dangerous leak, which was a particular average loss. But in each case the putting into port for the safety of ship and cargo was an act of sacrifice, giving rise to claims for general average contribution; in the case of A. this act of sacrifice followed, or was a continuation of, the original act of sacrifice, whilst in the case of B. it was itself the original act of sacrifice; in each case the proximate cause of the extraordinary expenses incurred was the putting into the port of refuge." . . . . "But if, in the case of A., the expenses of warehousing and reloading the cargo and of leaving the port were properly held to be the subject of general average contribution, I am unable to suggest any reason, satisfactory to myself, why the like principle should not be applied in the case of B.; in that case the expenses of unloading, warehousing, and reloading of the cargo and the coming out of port were as consequent upon the putting into port as they were in the case of A.; if they ought not to be treated as the subject of general average contribution in the case of B., they ought not, according to the view which I take of the circumstances of the two cases, to have been so treated in the case of A."

Such, also, was clearly the view of Lopes, J., in the Queen's Bench Division (s). "I have now to determine whether there is any practical difference, so far as the incidence of expenses is concerned, between the case of a ship necessarily Opinion of Lopes, J.

(s) 11 Q. B. D. at p. 617.

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seeking a port of refuge in consequence of an injury which is the subject of particular average. I can see no practical distinction. The putting into a port of refuge, if necessary, is an act of voluntary sacrifice, undertaken for the common benefit of the adventure, ship, cargo and freight, and I think every expense consequent upon it incurred to enable the ship afterwards to proceed safely on her voyage with her cargo so as to earn the freight, is incurred for the common benefit of the adventure, and is chargeable to general average" (*a*).

Opinions of Brett, M. R., and Bowen, L. J., in Svendsen *v.* Wallace.

952. The opinions, however, of Brett, M. R., and Bowen, L. J., were to a different effect. The basis of both judgments is the definition of general average by Lawrence, J., in Birkley *v.* Presgrave (*b*): "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo." Accepting this criterion, both learned judges (*c*) proceed to show that by English law, which differs herein from that of America and the Continent, a general average sacrifice must consist of an act done at a time when both ship and cargo were in peril, and for the preservation of both from such peril. To the proposition put forward on behalf of the plaintiffs, that it was sufficient to show that the object of the sacrifice or of the expenditure was "the benefit of the whole adventure," and that abundant authority existed for this contention, the answer was (*d*) that if and in so far as this and similar expressions (which have undoubtedly found their way not only into text-books but also into judgments of high authority) meant no more than "preservation of ship and cargo," the proposition was well-founded; but that if and in

(*a*) To the editors the opinions of Baggallay, L. J., and Lopes, J., on this point at least, seem to be based on sound reason. They have never been expressly dissented from, though Brett, M. R., and Bowen, L. J., do appear to have thought there might be some justification, on the score of established usage or otherwise, for the distinction above rejected. See 13 Q. B. D. at pp. 80, 95. In the House of Lords the point was noticed, but no opinion was expressed. 10 App. Cas. at p. 420.

(*b*) (1801), 1 East, 220.

(*c*) Brett, M. R., at pp. 72—76; Bowen, L. J., at pp. 84—87.

(*d*) Per Brett, M. R., at p. 74.

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so far as such expressions were used in any wider sense, the proposition was not in accordance with English law. Bowen, L. J. (*e*), disposes of the argument on this point in the following words:—

"Preservation of ship and cargo" is the test, not "benefit of the adventure."

"It is not necessary, it has been argued, that the expenditure or sacrifice should have been made for the common safety of ship or cargo, if it is made for the benefit of both, and in order to enable the vessel to bring her voyage, and the common adventure, to a successful issue. This doctrine has been advocated by various writers, and has engrafted itself upon the law of more than one foreign country; but whatever its theoretical value, it is not the law of England (see Harrison *v.* Bank of Australasia (*f*)). Exceptional cases, such as those suggested in the judgments delivered in Job *v.* Langton (*g*) and Walthew *v.* Mavrojani (*h*), may be imagined in which the safety of the ship and cargo and the safety of the common commercial enterprise would be almost convertible terms; and with reference to such cases it is possible to conceive that expenses after the ship and cargo were in safety from the sea might, on the ground of a physical danger common to both, be brought into general average. But (exceptional cases apart) it is not sufficient, according to English law, that an expenditure should have been made to benefit both cargo-owner and shipowner. The idea of a common commercial adventure, as distinguished from the criterion of common safety from the sea, would lead to the inclusion in general average of, at all events, temporary repairs of the ship caused by particular average loss, and would enable the shipowner to complete his part of the contract of affreightment by means of a money contribution levied perforce upon the cargo-owner."

953. Starting from this standpoint, both judges declare that when once ship and cargo are in a position of physical safety, there can be no further liability for general average,

(*e*) 13 Q. B. D. at p. 85.
(*f*) (1872), L. R. 7 Ex. 39.
(*g*) (1856), 6 E. & B. 779.
(*h*) (1870), L. R. 5 Ex. 116.

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unless it can be shown that a subsequent expenditure was a necessary consequence of a prior general average act (*i*), and they maintain that every item claimed must be specifically dealt with by application of the principles laid down to the particular circumstances of the case. The cost of unloading will be a general average sacrifice "if necessary for the common preservation of ship and cargo": otherwise "it will not in itself amount to a general average sacrifice at all, but it may nevertheless be properly included as a subject-matter of contribution whenever the expenditure is directly caused by some antecedent act of general average sacrifice."

How, if "preservation of ship and cargo" is the test, can any expenses be allowed which are incurred after ship and cargo are safe?

"The goods having been landed (*k*), there is an end of all danger common to ship and cargo. The contest between the parties in the present instance turns wholly on items of expenditure subsequently incurred. These cannot be brought into general average on the ground that they are general average sacrifice in themselves, for the hour of danger and of sacrifice is over. They can only become so chargeable, if it can be shown that they are part of the loss which some antecedent act of sacrifice entails. The first item in controversy which we are asked to consider relates to the warehousing of the cargo. Now, *primâ facie*, warehousing the cargo is a charge that ought to be borne by the cargo, which benefits exclusively by it. It may, conceivably, in some cases have been rendered necessary by an antecedent sacrifice, so as to fall within the definition of the loss caused thereby. But the only antecedent sacrifice in the present case was the putting into port for refuge, and it is difficult to see how,

View of Bowen, L. J., as to warehousing cargo.

(*i*) This is in reality rather Lord Justice Bowen's way of putting the case. The M. R. says that in order to justify liability for such subsequent expenditure, the act entailing such expenditure must be shown to be "part of another act which is a general average act" (13 Q. B. D. at p. 77). He then enunciates the opinion that whenever a ship goes into port to effect repairs which cannot be done without landing the cargo, the discharge is part of the "act of going in to repair," and recoverable as such in general average. This view is criticised *infra*, s. 958.

(*k*) 13 Q. B. D. at p. 89, per Bowen, L. J.

as between ship and cargo, the warehousing of the cargo was caused by the mere putting into port. The defendants have admitted their liability to bear the charge in full. In my opinion there is no reason to treat the warehousing in the present case as other than a charge on cargo. We come next to the reloading. Reloading is not an act of sacrifice, for long before it occurs both ship and cargo are safe. Is it then caused by any act of sacrifice, or is it part of the loss, in other words, which an antecedent act of sacrifice involves? Where, for example, a ship has cut away a mast and has put into port to repair the damage so caused, and has been compelled, in order to repair this special damage, to unload and to reload the cargo, it may follow, according to the decision in Atwood *v.* Sellar, that such expenses are all part of the loss involved in the original sacrifice. But in the present instance the only sacrifice has been the putting into port, and the reloading expenses are not part of the loss which putting into port has caused, but a loss caused by the captain's decision to repair his ship and to unload and reload the cargo for that purpose. The charges of reloading in such a case ought in principle to fall upon the freight, or else upon the freight and the ship together if the two interests are severed.

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Reloading.

954. "I come next to the charges outward, and this seems to me to raise a more difficult question. Expenditure of this description is not in itself a general average sacrifice, but may it not be said that it has been caused by one, on the ground that a ship which goes into port will have to come out again, and that the former operation directly causes the latter? If strict theory is to be applied there might seem to be a difference between the cases in which the vessel has done nothing in the port of refuge beyond availing herself of a temporary shelter, and the cases where she puts in in order to repair damage and because it was not safe for her to continue her voyage without such repairs. In the former case, where shelter alone is sought, the vessel might plausibly be said to come out simply because she previously went in.

Outward charges.

Sect. 954. In the latter case, where she puts in for repairs, the proximate cause of her coming out is not that she put in—for she could not have resumed her voyage had not the necessary repairs been effected upon her while in harbour—but that the master when in harbour decided, in the discharge of his duty and in the interest of his owners, on repairing the ship, reloading the cargo, and carrying on the voyage. The outward expenses ought therefore, as it seems to me, in the present instance to fall on freight."

Decision of Court of Appeal in Svendsen *v.* Wallace.

955. These principles being applied to the facts of the case before the Court, it was held firstly, that the expenses of reloading (*l*) the cargo after the ship had been repaired were not general average expenses. For clearly the cargo was not in any physical danger immediately prior either to the warehousing or to the reloading. Nor could it be said that either operation had been necessitated by, or formed part of, any prior general average sacrifice. The prior general average act had been simply, according to Bowen, L. J., the putting into port for safety, and on the attainment by ship and cargo of a position of safety, the object of the sacrifice was achieved. "The reloading expenses are not part of the loss which putting into port has caused, but a loss caused by the captain's decision to repair his ship and to unload and reload his cargo for that purpose, and ought in such a case to fall upon the freight, or upon the freight and the ship together if the two interests are severed."

Secondly, it was held that the outward expenses ought also in the present instance to fall on freight. This was regarded by Bowen, L. J., as a more difficult question, and, as will be seen from a passage which we have quoted, he suggested that there might perhaps be a distinction between the cases in which a vessel has done nothing in the port of refuge beyond availing

(*l*) Warehousing expenses are also similarly dealt with in the judgment of Bowen, L. J. But these were not in dispute, as the cargo-owner, rightly or wrongly, admitted liability. In so far, therefore, as the judgment covers expenses of this nature, it is an *obiter dictum*.

herself of a temporary shelter and cases where she puts in for repairs, without which it was not safe for her to continue her voyage (*m*). Sect. 955.

The judgments then proceed to review earlier authorities, which are shown to be substantially in accord with the views expressed. As regards Atwood *v.* Sellar, "the principle of law that appears to be the basis of that decision is that an expenditure directly caused by a general average sacrifice is part of the loss that it entails, and becomes the subject of general average contribution. The port of refuge expenses, which the present respondents claim to treat as general average, have not been caused by the putting into port, and there was no still earlier general average sacrifice to cause them, as in Atwood *v.* Sellar. They cannot, therefore, in the present case be said either to be general average sacrifices themselves, nor caused by any general average sacrifice" (*n*).

956. In the House of Lords the judgment of the majority of the Court of Appeal was affirmed, but the only point decided was as to the expenses of reloading, which were held not to be the subject of contribution. Upon the more difficult question as to the expenses of leaving port, it was considered unnecessary to express a formal opinion. The judgment of the House, delivered by Lord Blackburn, adds little to that of the Court of Appeal. As in the Court of Appeal, Atwood *v.* Sellar seems to be treated rather as a decision upon the particular facts of the case, than as laying down any principles differing from those enunciated by Brett, M. R., and Bowen, L. J. "If I thought (*o*) it was the state of the case before the House," that the going into port, the unloading, warehousing, and reloading, were parts of one operation carried through for the common safety and benefit, and properly to be regarded as continuous, "I should consider whether in such a case it might not fairly be argued that the whole of these operations were to be considered as Svendsen *v.* Wallace in the House of Lords.

(*m*) 13 Q. B. D. at p. 90.
(*n*) Per Bowen, L. J., 13 Q. B. D. at p. 95.
(*o*) 10 App. Cas. at p. 420.

Sect. 956. parts of the expense of repairing the damage, and therefore in a case where the cause of the damage was such that the expense of repairing it ought to be borne by all, as was the case in Atwood v. Sellar, to be borne by all, but that in a case where the cause of the damage was such that the expense of repairing it ought to be borne by the ship only, which is the present case, to be borne by the ship only. But having come to the conclusion that such is not the state of the case before the House, I do not enter into this inquiry."

Effect of Atwood v. Sellar, and Svendsen v. Wallace.

957. By these judgments it is submitted that the following propositions of law may now be considered as established:— *Firstly*, that there can be no act of general average unless it has been done with the object of attaining physical safety for ship and cargo. Both must either have been in physical danger at the moment when the loss or expenditure was incurred, or the loss or expenditure must be the result, of which such an act was the cause. *Secondly:* the "benefit of the adventure" has nothing to do with the matter, unless by "benefit" we mean physical safety or preservation, and by "the adventure" we understand ship, freight and cargo. Where a vessel necessarily puts into a port of refuge for common safety of ship and cargo, this is a general average act only in so far as the object is the common safety: when once the ship is there, the liability to contribute ceases unless the danger continues, or unless subsequent expenses are necessarily due to the earlier general average act. *Thirdly:* it is submitted that there is no difference in principle between a case where the necessity of putting into the port of refuge was itself occasioned by a general average sacrifice, and a case where it was occasioned by a peril of the sea. But in the former case it may be easier to make out a causal connection between expenses subsequently incurred than in the latter. And to every case the same test must be applied.

Application of the decisions.

958. Having determined to the best of our ability the general principles underlying this subject, we now propose to consider how they should be applied to the different heads of

expenditure (other than those already dealt with) which commonly occur in ports of refuge. Sect 958.

1. *The Cost of Discharging Cargo.*

This operation may be rendered necessary in various ways. As Bowen, L. J., points out (*p*), no universal rule can be laid down; each case must be considered according to its peculiar circumstances. The necessity may have arisen owing to a leak in the ship, which, if not stopped, would cause the vessel with her cargo to go down (*q*). This is clearly a case of general average. Or, the discharge may be simply in order to preserve the cargo, as where the injured ship is safe, but the cargo is perishable, if wetted (*r*): in this case the expenses would fall on the cargo alone. A more common case is where the object of the discharge is to enable the vessel to be repaired. This case presents difficulties. Brett, M. R. (*s*), was of opinion that the expenses under such circumstances should always be general average; but Bowen, L. J. (*t*), thought this would not be so, unless either necessary for the preservation of ship and cargo or directly occasioned by some antecedent act of general average sacrifice. Mr. Carver (*u*), in agreement with the latter view, considers that the cost of discharge is to be regarded as part of the cost of repairing. Hence where the cost of repairs is a general average expenditure, as where the necessity of repairing is due to a prior general average act, the cost of discharging in order to enable these repairs to be done is also a general average expenditure (*x*); but where the repairs are particular average on ship, so is the cost of discharging. Cost of discharge.

(*p*) Svendsen *v.* Wallace (1884), 13 Q. B. D. 77, 78.

(*q*) This appears to have been the case in Svendsen *v.* Wallace, although Brett, M. R., begins his judgment by saying that the only reason for discharging the cargo was in order to repair the ship.

(*r*) Svendsen *v.* Wallace, 13 Q. B. D. at p. 76, per Brett, M. R.

(*s*) Svendsen *v.* Wallace, 13 Q. B. D. at p. 78.

(*t*) At pp. 87, 88.

(*u*) Carriage by Sea, s. 408; Law Quarterly Review, July, 1892.

(*x*) Cf. Plummer *v.* Wildman (1815), 3 M. & S. 482; Hall *v.* Janson (1855), 4 E. & B. 500; 24 L. J. Q. B. 97.

Sect. 958.

View of Brett, M. R., criticised.

It is submitted that as between the two views put forward by Brett, M. R., and Bowen, L. J., respectively, that of Bowen, L. J., is best supported by principle, although in practice the former rule is the one adopted by adjusters (*y*). The Master of the Rolls defends this practice on the theory that the general average act, where a port of refuge is entered, is not the mere act of putting into port, but is the complex act of putting into port *for repairs* (*z*). Inasmuch, then, he argues, as it is necessary for the full performance of this complex act that the cargo should be discharged, it may well be said that the discharge is occasioned by such act of putting into port *for repairs*. This view, accepted as a solution of the difficulty by Lowndes (*a*), is criticised with effect by Mr. Carver (*b*), who points out that the act of putting into port is only a general average act so far as it is done in order to secure the common safety, and if it is done with any further or other object, then, so far at least, it is not a general average act. It may also be pointed out that when a particular act or thing has been done, such act or thing done from one motive is not a different act from the same act or thing done from another motive. The act of going into port, and the act of going into port for repairs, or indeed for any other object, are identical acts. If, then, the discharge of the cargo is not part of the act of going into port, as it clearly is not, how can it be said to to be part of what Brett, M. R., calls the act of going into port for repairs?

Accepting, therefore, the view of Bowen, L. J., in preference to that of Brett, M. R., it seems to follow that Mr. Carver is correct in holding that the expenses of discharging, where the discharge is necessary to enable the repairs to be done, ought to be treated in the same way as those of repairing.

(*y*) See Lowndes, General Average, s. 49.

(*z*) 13 Q. B. D. at p. 77.

(*a*) General Average, s. 49.

(*b*) Law Quarterly Review, July, 1892.

2. *The Cost of Reloading Cargo.*

Sect. 959. Reloading charges.

959. It is clear that the object of this operation can never be in order to rescue ship and cargo from actual peril (*c*). But it is said that the cost may be incidental to a prior general average sacrifice, and therefore recoverable as a general average expenditure. Thus, in Atwood *v.* Sellar, Cockburn, C. J., and Mellor, J., in the Queen's Bench Division, and the Court of Appeal (*d*), held that where the unloading of the cargo was due to the necessity of doing general average repairs, the cost of the reloading occasioned merely by the unloading must be deemed to be a part of one act or operation, and therefore recoverable as a general average expenditure. And this is the rule now followed by the Association of Average Adjusters. The practice was noticed by Bowen, L. J. (*e*), but the circumstances of the case before him did not make it necessary for him to express either approval or disapproval. The judgments, however, in Atwood *v.* Sellar, on which the practice of the adjusters is based, were unfavourably commented on by Lord Blackburn in the House of Lords, in Svendsen *v.* Wallace (*ee*), but, the facts being different, it was not necessary actually to overrule the earlier decision. It may be doubted, however, whether it is possible logically to reconcile the rule with the opinion of the Court of Appeal and of the House of Lords in Svendsen *v.* Wallace, to the effect that (at any rate where the repairs necessitating the unloading were due to perils of the sea) the expenses of reloading were not general average, but particular charges on freight (*f*). Nor does it seem possible to argue logically that the expenses of reloading must necessarily be borne in

(*c*) See per Bowen, L. J., 13 Q. B. D. at p. 89: "Reloading is not an act of sacrifice, for long before it occurs both ship and cargo are safe."

(*d*) 4 Q. B. D. 342; 5 Q. B. D. 286.

(*e*) In Svendsen *v.* Wallace, 13 Q. B. D. at p. 89.

(*ee*) 10 App. Cas. at pp. 417 and 419.

(*f*) 13 Q. B. D. 69; 10 App. Cas. 404.

Sect. 959. the same way as those of discharging. For instance, suppose that a vessel, having started a leak caused by a peril of the sea, puts into a port of refuge for repairs, and that it there becomes necessary, in order to prevent her going down with her cargo, to discharge the latter. The cost of discharge is, as we have seen, a general average expenditure. But can the subsequent operation of reloading be said to follow upon the prior operation of discharging as effect follows cause, or is it not more correct to say that the reason for the reloading is to enable the shipowner to perform his contract and earn his freight? It is submitted that the decision in Atwood *v.* Sellar on this point is irreconcileable with true principle as laid down in Svendsen *v.* Wallace (*g*), and that the result of adopting the criterion of Bowen, L. J., and testing the real object of each operation in accordance therewith, compels the conclusion that reloading expenses can never, apart from special circumstances, be anything else than particular charges on freight, however the original damage may have been caused which drove the ship into the port of refuge. Where freight has been, wholly or in part, paid in advance, the practice of adjusters is to debit the whole or a proportionate part of the expenses of reloading to the cargo-owners. Mr. Carver, however, points out that the cargo-owner has not, by paying freight in advance, undertaken to bear any part of the cost of bringing the goods to their destination, nor has the accident which gave rise to the expenses altered his right to have the voyage completed. He is, therefore, probably correct in his contention that expenses which would clearly be payable by the shipowner as particular charges on freight where freight is payable at the end of the voyage, should none the less be wholly borne by the shipowner where freight is paid in advance (*h*).

(*g*) As has been already intimated, the editors agree with Baggallay, L. J., and Lopes, J., in thinking that there is no such material distinction between the facts of Atwood *v.* Sellar and of Svendsen *v.* Wallace as can justify a distinction in the treatment of expenses of this nature.

(*h*) See Law Quarterly Review, July, 1892. Lowndes, General Aver-

3. *Warehousing Charges.*

Sect. 960.

Cost of warehousing cargo.

960. In Atwood *v.* Sellar (*i*) the Court of Appeal held that, the repairs themselves being general average, the cost of warehousing, while the repairs were being done, followed suit. In Svendsen *v.* Wallace, where the repairs themselves were particular average on the ship, this point was not in dispute, as the cargo-owner admitted his liability to pay the whole cost of warehousing. The expressions, therefore, of Brett, M. R. (*k*), that these expenses were not general average expenses, and of Bowen, L. J. (*l*), that they were a charge on cargo are *obiter dicta*. Accepting, as we do, Bowen, L. J.'s, view of the law as embodying the true principles applicable to the circumstances of every case, we find it difficult to avoid the conclusion that, whatever may have been the cause of the damage to the vessel, and whatever may have been the motive for the discharge of the cargo, in all cases where, as is usually the case, the cargo is warehoused simply in order that it may be kept safely while the vessel is being put into a condition to earn its freight, the warehousing charges should, like the cost of re-shipment, be a particular charge on freight. Bowen, L. J. (*m*), gave as a reason for his opinion that the cargo was alone benefited by the warehousing. It is arguable, however, that when the facts are as above described, the sole interest that is benefited is not the cargo, but the freight. The practice of average adjusters is, in accordance with the *obiter dictum* of Bowen, L. J., to charge all such warehousing expenses on the cargo alone. Mr. Carver, on the other hand, thinks (*n*) they should form the subject of general average contribution. There thus appear to be at least three possible different views on this point, and who shall say which of them is correct?

age, s. 53, p. 224, is to the same effect, and such also appears to have been the view of Lord Blackburn in Svendsen *v.* Wallace, 10 App. Cas. at p. 416.

(*i*) 5 Q. B. D. 286.

(*k*) 13 Q. B. D. at p. 78.

(*l*) At p. 89.

(*m*) 13 Q. B. D. at p. 89.

(*n*) Law Quarterly Review, July, 1892.

4. Wages and Provisions of Crew during Delay in Port.

Sect. 961.

Wages, &c., of crew.

961. In Atwood *v.* Sellar the Court of Appeal clearly seems to have considered that these charges might, under the circumstances, have been claimed as general average: "It is (*o*) extremely doubtful whether the expenses for wages of crew or provisions in a port of refuge have ever been disallowed by our Courts, as constituting a claim for general average, in a case where the ship has put into the port to repair damage itself belonging to general average" (*p*). No question, however, respecting such expenses was before the Court. In practice they are always debited in this country to ship; probably, however, rather as a particular charge on freight than on ship. This practice appears to be in accordance with most of the earlier authority on the point (*q*). Lowndes, however, urges strong reasons in support of his view that, at least where the repairs are themselves to be contributed for in general average, the wages and provisions of the crew during the time occupied in repairing should be similarly treated (*r*). In nearly all foreign countries contribution is allowed in all cases, irrespectively of the nature of the loss or damage which is being made good or repaired (*s*).

(*o*) Per Thesiger, L. J., delivering the judgment of the Court, 5 Q. B. D. at p. 291.

(*p*) The only case in which such charges were expressly allowed seems to be Da Costa *v.* Newnham (1788), 2 T. R. 407. This case, however, turns rather on peculiar facts, and has been much shaken by subsequent decisions. Cf. Brett, M. R., at p. 80, and Bowen, L. J., at p. 90 of 13 Q. B. D. In support, however, of Thesiger, L. J.'s, view, cf. Abbott, Shipping, 5th ed. p. 350; 11th ed. p. 533.

(*q*) Cf. Power *v.* Whitmore (1815), 4 M. & S. 141; Eden *v.* Poole (1785), Park, 117; Robertson *v.* Ewer (1786), *ibid.*, and 1 T. R. 127; and De Vaux *v.* Salvador (1836), 4 A. & E. 420. In America, however, cf. Hobson *v.* Lord (1875), 92 U. S. 397, where the Supreme Court appears to have allowed such expenses as general average. See also The Star of Hope (1869), 9 Wall. 236; Barker *v.* Baltimore & Ohio Railroad Co. (1871), 22 Ohio St. 45. Wages, &c. during detention by an embargo are not general average: Robertson *v.* Ewer, De Vaux *v.* Salvador, *ubi supra;* Arn. 2nd ed. p. 929. Nor are expenses of delay by quarantine, or while waiting for convoy: 2nd ed. p. 930.

(*r*) Lowndes, General Average 239—243.

(*s*) See Lowndes' Appendices.

5. *Expenses of coming out of Port.*

Sect. 962.

Outward expenses.

962. It is submitted that, like the costs of re-shipping cargo, these form in all cases a particular charge on freight. In practice they are now treated as general average, in accordance with the decision of the Court of Appeal in Atwood *v.* Sellar, in cases where the original loss was a general average loss, and as a particular charge on freight, in accordance with the view of the Court of Appeal in Svendsen *v.* Wallace, where the original loss was occasioned by fortuitous perils of the sea. It is doubtful, however, whether, if the general reasoning of Bowen, L. J. (*t*), in the latter case, is to be regarded as sound, such a distinction can be supported. When Svendsen *v.* Wallace was in the House of Lords (*u*) this point was left undecided.

Substituted expenses.

963. Before leaving the subject of expenses at a port of refuge, it may be well to notice a class of expenses which, though not peculiar to ports of refuge, yet more often arises to be dealt with there than elsewhere. These are called "substituted expenses," and are expenses which are really never incurred at all, but are allowed in general average or otherwise as if they had been incurred, on the ground that the owner of ship or cargo might have incurred them if he had pleased (*x*). The principle upon which they are allowed is that where I am in a position to take certain measures for the expense of which my underwriters would be liable, but instead of doing so, I prefer to adopt more expensive measures for which my underwriters are not liable, I shall nevertheless

(*t*) Bowen, L. J. (13 Q. B. D. at p. 90), does suggest, but does not decide, that different considerations may apply to this class of charges in cases where the vessel has put in for temporary shelter merely and in cases where she has put in for repairs. "In the former case the vessel might plausibly be said to come out simply because she previously went in," and therefore the cost of going out would be chargeable in the same way as that of going in—*i. e.*, as general average. But is not this to confuse *post hoc* with *propter hoc?* and is it not truer to say that in both cases the real object is to earn freight?

(*u*) 10 App. Cas. 404.

(*x*) Lowndes, General Average, 225.

Sect. 963. be entitled to recover from them the amount for which they would necessarily have been liable had I chosen to take the less expensive course. For example, where cargo which had been unloaded at a port of refuge, instead of being reloaded and carried to its destination in the ship, as it might have been, was forwarded by rail at a greater expense, it was held that the underwriter on freight, though not liable for the entire railway freight, was liable for the amount which it would have cost to reload the cargo in the ship (*y*).

Salvage, and similar services.

964. The remuneration by the shipowner of all those services, which are made necessary by a regard to the common safety, gives a claim to general contribution, if they are rendered under circumstances of an extraordinary nature, and on occasions when both ship and cargo are alike placed in jeopardy.

If such services, on the other hand, are not extraordinary, or are required for the safety of the ship alone or of the cargo alone, their remuneration will give no claim to contribution.

Towage.

For instance, ordinary towage in or out of port falls on the shipowner alone, as being a usual incident of the voyage which he has contracted to perform. But the imminence of danger may make it necessary to hire a steamer to tow, when under ordinary circumstances this would not be necessary; and the remuneration of such towage, or rather salvage services, would be a matter for contribution. It is unnecessary, after the attention we have devoted to Svendsen *v.* Wallace, to cite authorities for the existence of the principle. But it is necessary to consider certain cases as to its application. And the main question for discussion in this context appears to be: In what cases is money paid to third parties, or are expenses incurred by a shipowner, in respect of salvage operations, properly to be regarded as a general average expenditure?

"Salvage charges," properly so called, are the charges recoverable by a salvor under maritime law, and do not

(*y*) Lee *v.* Southern Ins. Co. (1870), L. R. 5 C. P. 397.

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include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril (*z*). Mr. Carver very clearly points out that salvage proper cannot be general average for the simple reason that the shipowner never becomes liable to pay the salvors for saving the cargo (*a*). The salvors have a lien on the ship for its proportion of the whole sum to which they are entitled, and likewise a separate lien on the cargo for its proportion. If the shipowner pays the whole, in order to release the lien on the cargo and proceed with the voyage, this is not according to English law a case of general average, inasmuch as English law takes no account of payments made merely for the benefit of the adventure (*b*). He recovers the cargo's proportion, independently of general average principles, as money paid to the use of the cargo-owner (*c*). Another strong argument against regarding salvage as general average is suggested by the recent decision of the Supreme Court of the United States in Ralli *v.* Troop (*d*), to the effect that there can be no case for general average unless there has been a voluntary sacrifice determined upon by the master, and by him alone. If this is good law in this country, it is difficult to see how in a case of salvage there has been any voluntary sacrifice at all, still less one made by the master. The true view appears to be that salvage must always strictly be a particular charge on the

Relation of salvage to general average.

(*z*) See Marine Insurance Bill, 1899, s. 66.

(*a*) The Raisby (1885), 10 P. D. 114.

(*b*) See Svendsen *v.* Wallace (1884), 13 Q. B. D. at p. 74.

(*c*) See Carver, Carriage by Sea, ss. 394, 395. He very aptly quotes Story, J., in Peters *v.* Warren (1841), 1 Story, at p. 468. The editors, however, do not agree with one of Mr. Carver's reasons for thinking that salvage is not general average, viz., that salvage falls immediately upon the different adventurers, whereas general average expenditures are only contributed for by the interests which complete the voyage, and according to their arrived values. The view of the editors is that liability to contribute towards general average expenditure, like salvage, does attach immediately. See *post*, s. 977, where this point is discussed; see also McArthur on this point, p. 171, n. (*e*).

(*d*) (1895), 157 U. S. 386; but see *contra*, Mouse's Case (1631), 12 Co. Rep. 63.

Sect. 964. interest against which it is assessed, and be recoverable as such, as a loss by the peril insured against. Nevertheless, the practice of adjusters is to treat it, and of underwriters to pay it, as general average, although, as Mr. Carver observes (*e*), the policy may be free of particular average, and although salvage does not come within the sue and labour clause (*f*).

Salvage under contract.

965. The expenses, however, of services in the nature of salvage rendered either by the assured, or by persons employed by him under contract, are on a different footing. Such expenses may, where properly incurred, and where incurred for the preservation of ship and cargo, be charged as general average (*g*). In such a case, however, care must be taken to see that an unfair burden is not being put upon the cargo. If, for example, a ship with her cargo on board is submerged, and the two are in fact raised together by one operation, the cargo will not be held liable to contribute more than it would have cost to raise it by itself (*h*). Nor is the cargo-owner necessarily bound to contribute to the whole amount which the shipowner may have agreed to pay the salvors, if, for instance, such amount exceeds the sum which would have been awarded in a salvage action (*i*).

Ransom, &c.

Akin to salvage services of this nature, and likewise recoverable in general average, is money paid by way of ransom to an enemy, which, though formerly prohibited in this country by express law (*k*), is now legal unless affected by Order in Council under the Naval Prize Act, 1864. So, too,

(*e*) Carriage by Sea, s. 394, n. (*p*).

(*f*) Aitchison *v.* Lohre (1879), 4 App. Cas. 755. The Marine Insurance Bill confirms this view by providing in sect. 66 that salvage may be recovered as a particular average loss.

(*g*) The shipowner is primarily liable to the salvors for the whole of their charges—both in respect of ship and of cargo—where the services have been rendered for an agreed sum. The Prinz Heinrich (1888), 13 P. D. 31, distinguishing The Raisby (1885), 10 P. D. 114.

(*h*) See Kemp *v.* Halliday (1865), 34 L. J. (N. S.) Q. B. at p. 243, with which compare the case of The Vancouver Mar. Ins. Co. *v.* China, &c. SS. Co. (1886), 11 App. Cas. 573; and Anderson *v.* Ocean SS. Co. (1883), 13 Q. B. D. 651; 10 App. Cas. 107.

(*i*) Anderson *v.* Ocean SS. Co., *ubi supra*.

(*k*) 22 Geo. 3, c. 25, repealed by the Naval Prize Act, 1864.

money paid to rescue ship and cargo from pirates and other plunderers, or by way of carrying out a compromise between neutrals and belligerents (*l*). Sect. 965.

966. Difficult questions have arisen as to how the expenses of what Lowndes calls complex salvage operations should be borne and apportioned. Operations of this nature are most common in cases of stranding. Thus, where a vessel strands on a beach with cargo on board, and a series of separate operations is necessary, it often happens that the cargo or part of it is put into a position of safety in the first instance, the ship with perhaps the rest of the cargo remaining in danger from which they are only saved by the continuance of the operations. The questions for consideration then are, firstly, are the expenses of the earlier operations general average, or a particular charge on the cargo saved? and secondly, are the subsequent operations, which save the ship and the rest of the cargo, general average, to the expense of which the cargo originally saved contributes, or is such expense to be borne merely by the interests to which the operations directly relate? This appears to be another of those cases, which are so common in questions of marine insurance, where there is little difficulty in the enunciation of the principle to be applied, but great difficulty as to its actual application to particular circumstances. The principle is simply that laid down generally in Svendsen *v.* Wallace, and more particularly in the cases to which we are about to refer, that expenses incurred for the general safety are to be contributed for, but expenses incurred on behalf of a particular interest are to be borne as particular average or charges upon such interest. Complex salvage operations. General average or particular charges.

967. In Job *v.* Langton (*m*), the "Snowdon" by perils of the sea ran ashore in Malahide Bay, on the coast of Ireland, and in order to get her off it became necessary to discharge the whole of the cargo and ballast. Afterwards, by a separate operation, the vessel was got off at great expense and was Joint operations where both ship and cargo are in danger.

(*l*) Stevens, Average, 26; 2 Phillips, s. 1337.

(*m*) (1856), 26 L. J. Q. B. 97; 6 E. & B. 779.

Sect. 967. towed to Liverpool for repairs. It was argued on behalf of the shipowner that the whole of these expenses must be contributed to, on the ground that they were all incurred in pursuance of one operation undertaken for the purpose of saving the whole. This argument, however, was rejected by the Court of Queen's Bench, and the claim for all expenses incurred after the cargo was saved was disallowed. The Court, however, appears to have considered that the expenses of the discharge of the cargo were general average, and not a particular charge on the cargo (*n*).

Moran *v.* Jones.

In Moran *v.* Jones (*o*) the "Tribune" ran aground in a gale on the East Hoyle Bank, near Liverpool, with 800 tons of ballast on board and some goods outwards for Callao. As soon as the weather moderated steps were taken to get her off: the ship's materials and goods were sent to Liverpool in lighters; the ship was then scuttled, 300 tons of ballast thrown overboard, and at last she floated. She was then taken to Liverpool and repaired, the goods were reshipped, and the voyage to Callao was completed. The Court held that the landing of the goods was not a separate transaction, as in Job *v.* Langton, but part of the continuous operation of getting the ship off in order to enable her to complete her voyage to Callao with the goods; and that the whole expenses of getting her off, including those incurred after the goods were landed, must be contributed for in general average (*p*).

Walthew *v.* Mavrojani.

968. In Walthew *v.* Mavrojani (*q*) it was held that where a ship with her cargo on board had been driven ashore at Calcutta by a cyclone, and after her cargo and rigging had been unshipped, the vessel herself was dug out at an expense of 2,300*l.*, this expense should not be allowed as general average, the cargo being already in safety before it was incurred.

(*n*) 6 E. & B. at p. 790.

(*o*) (1857), 26 L. J. Q. B. 187; 7 E. & B. 523.

(*p*) This decision, however, cannot now be supported on these grounds. See Svendsen *v.* Wallace (1884), 13 Q. B. D. at p. 80. The expenses would now be considered as particular charges falling on the shipowner.

(*q*) (1870), L. R. 5 Exch. 116 (Ex. Ch.).

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And in Royal Mail Steam Packet Co. *v.* English Bank of Rio (*r*) a steamer carrying, amongst other cargo, a quantity of specie ran aground on a coral reef and lay in a dangerous position. The specie was taken ashore in the ship's lifeboat, and soon afterwards the master, under stress of weather, jettisoned part of the remaining cargo. The vessel was got off, and completed her voyage with such cargo as was still left on board. The specie was forwarded to its destination by another vessel, but it was agreed that for the purposes of the case it should be treated as having arrived in the original steamer. Under these circumstances, the shipowners claimed that the expenses of the jettison, and all other extraordinary expenses incurred in getting the vessel off and in landing and protecting the specie, were general average for which they were entitled to a contribution from the defendants, the owners of the specie. The defendants contended that all these expenses were particular charges, either on the specie or on the vessel, and that there was no case for contribution at all. The judgment of the Court (Wills and Grantham, JJ.) upheld the defendants' contention, on the ground that the removal of the specie was effected not in order to secure the common safety of the ship and cargo, but simply for the purpose of saving the specie itself. "I think, therefore," said Wills, J., "that when the general average loss was incurred . . . it had ceased to be at risk, and that upon no reasonable view of the facts can its removal be considered as a part of the means taken for saving any common adventure. I am consequently of opinion that it is not liable to contribute to the jettison, or to any of the expenses of getting the ship off the ground incurred after it was landed" (*s*).

Difficulty usually one of fact, rather than of law.

969. The difficulty of laying down any rigid rule for the solution of all questions of this nature is clearly apprehended by the learned judge: "Cases, no doubt, may occur in which it may be difficult to say whether the purpose for

(*r*) (1887), 19 Q. B. D. 362. (*s*) 19 Q. B. D. at p. 375.

[illegible]

And to the same effect are the observations of Blackburn, J., in Kemp v. Halliday: "I do not mean to say that in every case where a ship with a cargo is submerged and the two are in fact raised together by the general expenditure incurred, it can necessarily be for the common preservation of both. I think it is in every case a question of fact whether it was so" (*u*).

Mr. Carver (*x*) and Lowndes (*y*), while accepting the principle as above laid down, and agreeing that every case must be considered according to its own circumstances, suggest various tests in order to facilitate the determination of the question whether a particular operation was undertaken for the sake of a particular interest, or whether such particular operation should more properly be regarded as a part of a continuous operation for the safety of all. The tests suggested for particulars of which the reader is referred to their valuable treatises) are undoubtedly valuable as indicating considera-

(*t*) This is a quotation from McAndrews v. Thatcher (1865), in the Supreme Court of the United States, 3 Wall. at p. 370.

(*u*) Per Wills, J., 19 Q. B. D. at p. 374.

(*x*) 34 L. J. N. S. Q. B. at p. 243. And *cf.* also the American cases of Coast Wrecking Co. v. Phœnix Ins. Co. (1881), 7 F. 236; and Reliance Marine Ins. Co. v. N. Y. & C. Mail S.S. Co. (1896), 77 F. 317. The rule in the United States as to whether contribution ceases with common danger is apparently laxer than in England (*ibid.*).

(*y*) Carriage by Sea, s. 398.

(*z*) General Average, ss. 40—42.

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tions which may be usefully taken into account in any case that may arise, but it does not appear possible to regard them in any higher light. The circumstances of each case must vary, and no one test can suffice for the solution of all. On one point Mr. Carver, with whom Lowndes agrees, is emphatic: "The two operations of taking out the cargo and getting the ship off, may be regarded as separate transactions for the benefit of the parts, or as constituting one whole transaction for the benefit of the whole. The first operation is only a general average act when both have that character, and the same is true of the second. One or other view should be adopted throughout; the ship should not contribute to the cargo unless the cargo also contributes to the ship, and *vice versâ*" (*a*).

What contributes to general average.

970. Having thus enumerated the losses for which a general average contribution is to be made, let us inquire upon what property such contribution is to be levied.

Everything contributes which has been at risk at the time of the loss, and is ultimately saved.

All which is ultimately saved out of the whole adventure (*i.e.*, ship, freight, and cargo) contributes to make good the general average loss, provided it have been actually at risk at the time such loss was incurred. Hence goods landed, or sold for the necessities of the ship, before a jettison, do not contribute (*b*); "because they were not exposed at the time of the jettison to a community of risk, and were not saved thereby" (*c*). So neither, for the same reason, "do goods taken on board after the jettison" (*d*).

That which has been sacrificed contributes equally with that which has been saved.

That which has been sacrificed contributes in general average equally with that which is saved (*e*).

By the civil law only the goods actually saved were to contribute (*f*); but by the Consolato del Mare, which has been followed in this respect by the uniform practice of later times,

(*a*) Carver, s. 400. See also McArthur, 173—177.

(*b*) 1 Emerigon, c. xii. s. 42, p. 629.

(*c*) 3 Pardessus, Droit Com. p. 233.

(*d*) Benecke, Pr. of Indem. 306.

(*e*) Cf. Royal Mail Co. *v.* English Bank of Rio (1887), 19 Q. B. D. at at pp. 371, 372.

(*f*) Id tributum servatæ res debent. Dig. lib. xiv. tit. 2, f. 2,

Sect. 970. the contribution is to be made equally upon the property saved and the property sacrificed; "and this," observes Boulay Paty, "is very equitable, for if the goods jettisoned do not contribute, the owner thereof, receiving their total value, would suffer no loss by the sacrifice, while the other owners would" (*g*). The same reasoning applies also to goods which have been sold for the joint benefit of ship and cargo (*h*), and also to the freight which would have been payable in respect of such goods: for as this freight is contributed for, the shipowner would suffer no loss by the sacrifice of freight in the goods jettisoned or sold, unless he also contributed in respect thereof (*i*).

Freight of goods jettisoned must contribute.

Rule where successive jettisons or sacrifices.

971. Where there have been two jettisons or two distinct occasions, the goods first jettisoned are for the purposes of contribution deemed to have continued on board, and to have been subject to the fortunes of the voyage. They contribute, therefore, not only to the loss arising from their own jettison, but also to that occasioned by the subsequent jettison, although they were then no longer on board, provided always that their destination was not reached when such subsequent jettison was necessitated. And the rule is the same when the second sacrifice is not a jettison, but a general average loss of some other nature; for instance, port of refuge expenses, to which such goods would have been liable to contribute had they not been jettisoned. And similarly, where after a jettison the goods remaining on board are accidentally damaged, and it can be shown that the jettisoned goods would inevitably have similarly suffered had they remained on board until arrival at their destination, the latter are deemed to have been likewise damaged in fact, and are to be contributed for at such damaged value (*k*).

(*g*) Consolato del Mare, c. 94 of the Italian translation, c. 51 of Pardessus, Lois Maritimes, vol. ii. pp. 101, 102.

(*h*) Boulay-Paty, Comment. on Emerigon, vol. i. p. 632.

(*i*) Cleirac, 88, No. 4; 2 Emerigon, Contrats à la Grosse, c. iv. s. 9, p. 475.

(*j*) Stevens, Average, 61.

(*k*) Lowndes, 293, 294. *Aliter*,

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Do passengers' luggage, jewels, &c., contribute?

972. According to Lowndes (*l*), the whole of the property on board ought to contribute to general average. The lives preserved, however, are not within this rule, nor are the wages of the crew (*m*). The only exemption which he recognises is the luggage and personal effects of the passengers and crew, and other small items which are only excluded owing to their comparative insignificance of value. Unconsumed provisions are brought into contribution, being included in the value of the ship.

Though there is much to be said in favour of the principle which regards everything saved as liable to contribute, it is doubtful whether this is in accordance with law. In Brown *v.* Stapyleton (*n*) it was held that provisions belonging to the charterer at the end of a voyage did not contribute. "It is not," said Best, C. J., "every object of value which has been held liable to a contribution for average, but only such stores as are termed *merces*. *Merces* has never been held to extend to provisions, but includes only the cargo put on board for the purposes of commerce, and the practice shows that this has been the understanding of all times. Magens, Molloy, Beawes, Stevens, and other writers all expound the word *merces* in this way; all in terms exclude provisions. They concur in saying that things of light weight, but of considerable value, must contribute if they belong to the cargo, but not if they belong to the passengers." The rest of the Court concurred in disallowing the claim for contribution. It is doubtful, however, whether Park, J., intended to concur

however, Arnould (2nd ed. pp. 934, 935), citing Emerigon and Benecke.

(*l*) S. 76, pp. 324, 325.

(*m*) As to passengers' luggage, and for a discussion in America of the whole subject, see Heye *v.* North German Lloyd (1887), 33 F. 60; 36 F. 705. The Judge of the District Court of New York, in the course of a learned and exhaustive judgment, came to the conclusion that passengers' luggage stored in the luggage compartment of a steamship was both liable to contribute, and was entitled to receive contribution, in general average. *Secus*, however, as regards baggage not so stored but in daily use. On the question as to the right to receive contributions, this judgment was affirmed in the Federal Court of Appeal, and it was generally approved.

(*n*) 4 Bing. 119.

Sect. 972. in the general proposition laid down by the Chief Justice. "All merchandise," he says, "put on board for the purpose of traffic is liable to be brought into contribution, and in merchandise is included all property of great value unless attached to the persons of the passengers, but property so attached does not contribute." The text-writers seem to be agreed that gold, silver, jewels, precious stones, and other small articles of value are liable to contribute, unless ordinarily carried about the person or forming part of the wearing apparel (*o*).

It is doubtful whether the dicta in the case of Brown *v.* Stapyleton would be followed in the present day. There is more reason in the opinion expressed by Lowndes, supported as he is by modern practice.

Bank notes.

973. Bank notes, it appears, should not contribute, being, as Phillips (*p*) maintained, not so much property as evidence of property. Arnould (*q*), however, was of a contrary opinion. Deck goods contribute, whether or not they would, if jettisoned, be entitled to a contribution.

Goods belonging to government contribute.

Goods belonging to government by the old laws did not contribute (*r*). Valin, however, thought they ought to do so (*s*); and Emerigon seems to have been of the same opinion (*t*). And it was held by Story, J., in the United States, after a most masterly examination of the principles of the supposed exemption, that there was no ground for it, either in law or practice, and that goods belonging to govern-

(*o*) 2 Phillips, s. 1394; 1 Magens, 63, s. 55; 1 Park, 293. The case of Peters *v.* Milligan (1787), 1 Park, 296, has been cited as an authority for this proposition. It is not, however, clear that this case decides anything more than that in cases where such articles do admittedly contribute, they contribute according to their full value. Abbott (5th ed. p. 355) and Marshall (4th ed. p. 432) say simply that jewels if part of the cargo do, and if belonging to the persons of passengers do not, contribute. They do not seem to have considered the intermediate case of jewellery belonging to passengers, but neither carried for traffic, nor attached to the person.

(*p*) 2 Phillips, s. 1397.

(*q*) 2nd ed. p. 936.

(*r*) Cleirac, cited by Emerigon, *ubi supra*; Jugemens d'Oleron, art. 8.

(*s*) Tit. des Avaries, art. 11, No. 2.

(*t*) Emerigon, c. xii. s. 42, p. 642.

ment are as liable to contribute as any other part of the cargo saved by the sacrifice (*u*). The practice among adjusters is to make them contribute. Sect. 973.

974. Having thus seen in respect of what losses a contribution in general average can be claimed, and upon what property it is to be assessed, it remains to be considered how the amount to be paid in contribution is first estimated, and then apportioned on the respective interests subject thereto. The process by which this is ascertained is called the adjustment of general average. Principles of general average adjustment, and their application to different kinds of general average losses.

The leading principle of general average contribution, to whatever kind of loss it may be applied, is this: That all the parties interested in the adventure, whose property it was intended to preserve by the general average act, should be sufferers by the loss in exact proportion to the extent of their respective interests, but no farther; and this object can only be attained when the party whose property has been sacrificed, whose money has been disbursed, or whose credit has been pledged, is placed by the adjustment exactly in the position he would have stood in had the sacrifice been made, the expense incurred, or the credit pledged, not by himself, but by some other of his co-adventurers.

Clear, however, as is this principle, difficulties have arisen as regards its application which have led to a difference of opinion amongst those who have studied the subject. The question is whether, after a general average loss, the adjustment ought to be regulated by the state of facts existing at the time when the loss takes place, or by the state of facts existing at the termination of the adventure; or thirdly, by the state of facts existing at the one time or at the other time, according as the loss consists of a general average expenditure or a general average sacrifice. Suggested difference in adjusting sacrifices and expenditures.

975. Generally speaking, the practice of adjusters hitherto has been to regard solely the state of facts existing when the Practice of adjusters hitherto.

(*u*) The United States *v.* Wilder, In re Schooner Jasper (1838), 3 Sumner, 308, cited 2 Phillips, Ins. s. 1345.

Sect. 975. adventure is determined (*x*). The result of this practice is that where, after a general average sacrifice or expenditure, a part of the property remaining at risk has been lost or damaged by a peril of the sea or otherwise, the owner of such part has in respect thereof either escaped contribution altogether, or has only been deemed liable to contribute on its reduced damaged value. But this practice has not been uniformly adopted. Some adjusters, while agreeing that the state of facts existing at the termination of the adventure is to be regarded where the loss consists of a sacrifice of an actual part of ship or cargo, hold that where the loss consists of an expenditure incurred, the time to be regarded is the time when the outlay was made.

Adjustment of losses arising from sacrifices.

As regards actual sacrifices of a part of ship or cargo, it will be observed that the adjusters are in agreement with one another; and in their agreement with one another they are also in agreement with the law, the object of which is to secure that the owner of the property sacrificed shall be neither in a better nor in a worse position than he would have been in if the sacrifice had fallen upon someone else. In order to secure this double object, the property sacrificed is correctly regarded as though it had never been lost, but actually constituted a portion of the whole mass of property upon which the contribution is assessed at the time the adjustment is made; its supposed value is estimated, and in proportion to the amount at which it is estimated it takes its full share with the remaining interests, for whose benefit it was sacrificed, in contributing to the loss thereby incurred.

Thus, to take a very simple instance, suppose property, the value of which, if saved, would have been 100*l.*, to have been sacrificed for property the value of which, as saved, is 900*l.* The whole sum upon which the contribution is to be levied will be the aggregate value of the property sacrificed and that saved, viz., 1,000*l.*; the amount to be made good

(*x*) An exception, however, to this practice is allowed in cases of expenditure, where both ship and cargo are totally lost. Lowndes, 266.

being 100*l.*, or the tenth part of 1,000*l.*; the property saved contributes a tenth, or 90*l.*, and the property sacrificed also a tenth, or 10*l.*, making together the whole amount lost, or 100*l.* Sect. 975.

It is clear that this is the only equitable way in which this kind of loss can be adjusted, for if the property sacrificed did not contribute like the rest, the owner of such property, receiving its total value, would be better off than the rest of the co-adventurers, and would not be in the same condition in which he would have been if their property had been sacrificed instead of his.

No contribution due for sacrifices where nothing is saved.

Conversely, it is also clear, that where after the sacrifice the whole of the rest of the adventure utterly perishes, no contribution can be due, for in such case, even if the property had not been sacrificed, there is no reason to suppose that it would not have perished like the rest: its owner is in no worse position than he would have been had it been made by some one else on board, and not by himself. The condition of all the co-adventurers is precisely equal: all is lost; there is nothing to contribute from, and nothing to contribute for (*y*). Hence the rule with regard to sacrifices for the general benefit is, that they are not contributed for where nothing is saved.

Adjustment of expenditures.

976. As regards sacrifices, then, the law is clear. But in the case of expenditures attention must be paid to some different considerations. A general average expenditure consists in the actual payment of money (*z*) by the shipowner on account of all interests. It seems obvious that this should give him a personal and absolute claim against all the parties interested in the adventure, in respect of the money thus laid out on their behalf, and that from the moment the advance has been made. It is equally obvious,

(*y*) Emerigon, c. xii. s. 41; Phillips, s. 1317; Fletcher *v.* Alexander (1868), L. R. 3 C. P. 375, is a direct authority for the principles above enunciated.

(*z*) Either in immediate cash, or as the result of the incurring of a debt to be defrayed subsequently.

Sect. 976. on the true principles of adjustment, that they are bound in equity to liquidate this claim in full, whether any part of the property, for whose benefit the outlay was made, be ultimately saved or not. Were this not so, the object to be had in view in every adjustment of general average would not under all circumstances be attained, for in those cases where the ship and goods, after being relieved by the expenditure, wholly perish before arriving at the port of destination, the party making the advance would, if no contribution were to be made, be worse off than the other parties on whose behalf it was incurred, as he would not only have lost, like the rest, his own property, but moreover would remain burdened with a debt contracted on their account, or be the loser of a sum of money laid out for their safety.

Hence, the long-established rule used to be that disbursements for the general benefit must be fully reimbursed in general average, whether the ship and cargo be eventually saved or not (*a*).

Criticism of present practice.

977. Notwithstanding these considerations, however, the general practice of adjusters is, as we have already observed, not to give practical effect to this distinction, but to allow contribution, and to assess the contributory values, in all cases with respect to the state of facts as existing at the port where the adventure is terminated, whether the claim for contribution arise out of sacrifices or expenditures. In neither case, therefore, does any property contribute which does not ultimately arrive, and such property, moreover, only contributes on its arrived value. This practice has the

(*a*) Benecke, Pr. of Indem. 251; Stevens, Average, 20, 5th ed. So, 2 Phillips, s. 1374: "In case of expenditures which are absolutely reimbursable, the value at the time of incurring them ought to contribute; this being the proportion in which the several parties are interested." And see The Mary Thomas, [1894] P. 108, where Barnes, J., on similar reasoning to that contained in the text, held that the doctrine of Dickenson *v.* Jardine ((1868), L. R. 3 C. P. 639) applied only to cases of sacrifice, and not to expenditures; and the judgment of Barnes, J., was approved by the Court of Appeal (*ibid.*).

support of Mr. Carver (*b*) and of Mr. McArthur (*c*); but it is nevertheless submitted that there is substance in the distinction, and that the older rule was more in accordance with legal principle. The former puts, as an extreme case, that of a ship which has arrived at her port of destination, but with her cargo made worthless by perils met with after a general average expenditure at a port of refuge, and maintains that in such a case the ship alone has reaped the benefit of the extraordinary expenditure, and that the shipowner alone should therefore bear it. Whether or not, in answer to this argument, it is fair to contend that under such circumstances the cargo has actually reaped a benefit—consisting, that is, in the deliverance from a peril and the acquisition of a further chance of ultimate safety—may be doubted. The cargo-owner has undoubtedly had this advantage: but the argument would perhaps lead too far, so as to be equally applicable in support of the immediate accrual of a right to contribution, irrespective of ultimate safety, in a case of jettison or other similar sacrifice; which right clearly does not exist. The real answer to Mr. Carver is, that, where money has actually been properly expended by one person on behalf of another, it is immaterial to consider whether or not such other person has derived benefit from the expenditure. As he himself points out, there is one obvious distinction between all cases of sacrifice of property during a voyage, and of expenditures. In the former cases something is given for the rest which would otherwise itself have had to share in the subsequent risks of the voyage: in the latter case, that which is given is something which never could be exposed to those risks; the repayment, therefore, of which ought not to be contingent in any way upon those risks. Mr. Carver admits that an exception to the principle which he supports is established by the existing rule of practice (which he approves) whereby, in the case of a total loss of both ship and cargo, the ship-

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(*b*) Carriage by Sea, s. 428. (*c*) Insurance, p. 205 (2nd ed.).

Sect. 977. owner is not compelled to bear the whole expense himself, but is entitled to a contribution from the owners of the various interests as those interests existed at the place where the expenditure was made; and he would extend this rule to cases where the value of what is ultimately saved is less than the amount of the expenditure, so as to make all interests as they existed at the place of the expenditure contribute towards such deficiency. It is also clear that Mr. Carver's principle cannot be applied to expenditures by the master in reward of salvage operations, in cases where these are general average. But is it possible to allow such important exceptions, and yet at the same time maintain the alleged rule which they infringe? Mr. McArthur gives what is, perhaps, the best excuse for the present practice, *i. e.*, the practical difficulty, where goods have been subsequently lost, in determining what their value was at an intermediate port for which they were never destined, but where the expense may have been incurred (*d*).

Rule of adjustment in case of goods sold.

Are goods sold contributed for as sacrifices or expenditures?

978. In the case of goods sold by the master to raise funds in a foreign port, there is much controversy amongst the older authorities as to whether the loss thence arising should be adjusted in the same manner as the loss arising from sacrifices, or as that arising from expenditures used to be contributed for; whether, that is, in case the whole adventure subsequently perishes, the owner of the goods sold is or is not entitled to contribution. There has been no express (*e*) decision on this subject, either in our own Courts or those of the

(*d*) This subject is exhaustively discussed by Lowndes (Gen. Av. pp. 259—271, 4th ed.), who supports the view here adopted. See also The Mary Thomas ([1894] P. at pp. 117—118), and in the Court of Appeal, the reasoning in which case is strongly in favour of the same view; and cp. Benecke, Pr. of Indem. 298; and in America, Douglas *v.* Moody (1813), 9 Mass. R. 518; Spafford *v.* Dodge (1817), 14 Mass. R. 79; and 2 Phillips, ss. 1374, 1377. Mr. McArthur appears to agree with Mr. Carver (p. 205, n. (a)).

(*e*) Cases bearing on the point are Powell *v.* Gudgeon (1816), 5 M. & S. 431; Richardson *v.* Nourse (1819), 3 B. & Ald. 237; Atkinson *v.* Stephens (1852), 21 L. J. Ex. 329; 7 Exch. 567; Hopper *v.* Burness (1876), 1 C. P. D. 137; and Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426. See Lowndes, pp. 279—284. The question whether such sale is a matter for general average at all is discussed in s. 927, *ante*.

United States, and the foreign authorities are exceedingly conflicting. Sect. 978.

In the twentieth century the point does not appear to be of so much importance as it was in old times, when the facilities for communicating with owners at home, and so obtaining funds, were not so abundant. It appears clear, however, that where the goods are sold in order to defray expenses for which the shipowner, by his contract of affreightment, is bound to provide funds, the cargo-owner obtains an absolute claim against the shipowner from the moment of their sale; and this claim must doubtless be liquidated, whatever may be the issue of the adventure (*f*). Where, however, the goods are sold in order to defray general average expenses, Arnould was of opinion that they were not to be contributed for unless something was finally saved (*g*). This view is probably correct, on the ground, as pointed out by Mr. Carver (*h*), that the goods sold are, as in cases of jettison, to be regarded as though they had remained on board, exposed to the vicissitudes of the voyage. It would appear to follow from this reasoning that where a partial loss occurs of the goods remaining on board, the probability that the goods sold would themselves have participated in such loss should be taken into account in estimating at what value such goods should be contributed for.

Rule of adjustment where ship perishes but goods are saved.

979. There is another question on which there has been a great diversity in the positive regulations of foreign states and the opinions of jurists; viz., where the ship perishes by the agency of the very peril to avert which the sacrifice was made, but the cargo, or part of it, is saved from the wreck, does that which was saved contribute for that which was sacrificed?

On the one hand, the civil law expressly decrees that in such case no contribution shall be made, but that the

(*f*) Cp. Duncan *v.* Benson (1847), 1 Exch. 537; Benson *v.* Duncan (1849), 3 Exch. 655.

(*g*) 2nd ed. pp. 940—942, where the old authorities are reviewed.

(*h*) Carriage by Sea, s. 432.

Sect. 979. merchants shall save all they can on their own account *tanquam ex incendio* (*i*). And similarly the effect of the Code de Commerce is, that if the jettison does not save the ship no contribution takes place. If, however, the ship, after having been saved from the particular peril which gave rise to the jettison, should be lost by a subsequent accident during the voyage, the goods saved are to contribute according to their value in the state in which they may be, after deducting salvage expenses (*k*). To the same effect is the law of Spain and Portugal, Belgium, Italy and Holland. In Germany, however, and probably in Scandinavia, the rule is different, contribution being always claimable against the interests preserved, irrespective of the loss of the ship (*l*). In America there appear to have been decisions both ways (*m*).

As to text-writers, Marshall (*n*), Stevens (*o*) and Kent (*p*) agreed with the rule as laid down in the Code de Commerce. Weijtsen, however, an early and esteemed writer upon average, adopted the contrary view, for the reason that if the goods jettisoned had not been so sacrificed their owners might have saved or recovered them, all or in part, as the other owners have (*q*).

Benecke, after examining all the authorities on the subject (*r*), and Phillips (*s*) both adopt the reasonings of

(*i*) Dig. lib. xiv. tit. 2, f. 7; Pardessus, Lois Maritimes, vol. i. p. 108.

(*k*) Art. 423. So, too, Pothier, Contrats Maritimes, No. 114; 1 Emerigon, c. xii. s. 41, p. 602; Boulay-Paty, Comment. *ibid.* 603; 2 Valin, tit. du Jet, arts. 15, 16, pp. 525, 529.

(*l*) This information as to foreign law has been mainly derived from the Appendices to Lowndes' work on General Average, their indebtedness to which the editors take this opportunity of expressing.

(*m*) See decisions cited on the one hand in 3 Kent, Com. 234, and on the other hand in 2 Phillips, s. 1318; Caze *v.* Reilly (1814), 3 Wash. C. C. R. 298; cf. also Walker *v.* U. S. Ins. Co. (1824), 11 Serg. & Rawle, 51. Mr. Gourlie, a modern writer on the subject, cited in Lowndes, agrees with Kent's view.

(*n*) 2 Marshall, Ins. 541.

(*o*) On Average, 8.

(*p*) Com. *ubi supra.*

(*q*) Traité des Avaries, art. 33.

(*r*) 4 Benecke, System des Assecuranz, 18—23, and also in his Pr. of Indem. 178—181.

(*s*) Ins. vol. ii. s. 1318.

Weijtsen and the rule of the German law. So, also, does Mr. Carver (*t*). Sect. 979.

Conclusion as to the law and suggestion of a practical rule.

980. In our Courts there has been no decision on the subject, and in the absence of binding authority the question would have to be determined on principle alone. In this view the argument of Weijtsen undoubtedly appears to have great force. There is, at all events, a probability in the case supposed that the goods sacrificed might, if not so sacrificed, have been saved like the rest. If, therefore, they are not contributed for, their owner, in consequence of the jettison, is worse off than he probably would have been if the goods sacrificed had belonged not to him, but to someone else on board. Arnould (*u*) considered that in practice it would be a sensible rule that, where either the whole or the greater part of the cargo was saved, contribution should be made, even though the ship perished at the time; but that no contribution should be due where the goods saved were either small in quantity or greatly damaged in condition. A more logical view, however, appears to be that of Mr. Carver (*x*), viz., that in all cases after a jettison, whether the ship be wrecked or not, property saved contributes. "But the value to be contributed to is estimated with reference to the risks the jettisoned goods would have run, had they continued on board. And if they would in that case have been lost that value is reduced to nothing."

Where the ship is saved at the time, but ultimately perishes in the after part of the voyage.

But whatever diversity of opinion may exist with regard to the point just discussed, there is no doubt whatever about this position: that if the ship survives the peril, to avert which the sacrifice was made, and is ultimately wrecked in the after part of the voyage, all that is saved from the wreck must contribute to make good that which was previously sacrificed; for without such previous sacrifice nothing would have been saved at all (*y*).

(*t*) Carriage by Sea, s. 372.

(*u*) 2nd ed. p. 944.

(*x*) Carriage by Sea, ss. 372, 418. Cf. Fletcher *v.* Alexander (1868), L. R. 3 C. P. at p. 383; and *post*, s. 981.

(*y*) 1 Emerigon, c. xii. s. 41, p. 602. Boulay-Paty says that, in

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Mode of estimating the amount of loss for the purposes of general average adjustment.

Loss arising from jettison of goods.

981. Supposing the case to be one in which contribution is due, the first step to be taken towards adjusting the general average is to ascertain the value at which the property sacrificed and the loss incurred ought to be estimated for the purposes of the contribution.

As a general rule, goods jettisoned are to be contributed for on the same value at which they contribute, which is the net value they would have sold for at the port of adjustment on the day of discharge, deducting freight, duty, and landing expenses (*z*). The port of adjustment is, in nearly all cases, the port of destination (*a*). Where, however, the jettison takes place very near the outset of the voyage, so that the ship puts back into the port of departure, the adjustment may be settled there (*b*), and where the ship does not reach the port of destination, the adjustment is settled at the port where the voyage is terminated (*c*).

Where the average is adjusted at the port of departure.

Where it is adjusted at an intermediate port.

Valuation of damage occasioned by jettison.

Where, after the jettison, the rest of the cargo arrives in port in a damaged state, owing to causes which would equally have affected the goods jettisoned had they remained on board, the amount at which the goods jettisoned should be contributed for, is the net sum they would have realized in a damaged state (*d*). The amount of damage done to ship or goods by the jettison is to be estimated, for the purposes of

order to apply the rule, the storm which occasioned the jettison must have been entirely at an end, and the ship have proceeded on her voyage again in the ordinary course. Comment. on Emerigon, *ibid.* 604. Cf. Phillips, s. 1318.

(*z*) Benecke, Pr. of Indem. 288; Phillips, s. 1371. Cf. York-Antwerp Rules, 1890, rule xvi. in Appendix D.

(*a*) Simonds *v.* White (1824), 2 B. & C. 805.

(*b*) Benecke, Pr. of Indem. 289. So held in the United States, Tudor *v.* Macomber (1833), 14 Pickering, R. 34; Phillips, s. 1365. This was the case of a cargo of ice shipped at Boston, bound for Charleston, jettisoned near Cape Cod. The ice would have fetched a high price at Charleston, and was utterly valueless in the port of distress (Chatham, near Cape Cod). At Boston its value was the cost of cutting, storing and shipping; this was taken as the contributory value.

(*c*) Benecke, 289; Lowndes, 251; Fletcher *v.* Alexander (1868), L. R. 3 C. P. 375.

(*d*) Benecke, Pr. of Indem. 293. This rule was adopted by the Court of Common Pleas in Fletcher *v.* Alexander, *ubi supra*; cf. Lowndes, 294.

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adjustment, by deducting their net proceeds, as damaged, from their net proceeds, if sound (*e*). If the goods jettisoned were subject to leakage or breakage, the ordinary leakage and breakage ought, it seems, to be deducted in estimating the value at which they are to be contributed for (*f*). Where goods which have been jettisoned are recovered before the adjustment takes place, the amount at which they are to be contributed for is the amount of the damage done to them by the jettison, and the expenses of recovering them (*g*).

Where they are recovered after the adjustment, the amount which has been paid for them in contribution over and above what is necessary to cover these two items is to be refunded to the several parties on whom the contribution has been assessed (*h*).

Valuation of jewels, &c. packed as articles of inferior value.

982. Where jewels, or other valuables, are denominated in the bill of lading as articles of inferior value, they are to be contributed for as of such inferior value (*i*); so if they are packed up in a box without any intimation to the master of their value, and this box be thrown overboard, it is decreed by the Laws of Wisbuy, and stated by foreign jurists, that they shall be contributed for only upon the value of the box, or of the goods the master might reasonably suppose it to contain (*k*).

Valuation of freight sacrificed.

The amount payable in contribution for freight is the gross freight which would have been earned on arrival, less any charges which the shipowner would have incurred in order to earn such freight, but has, in consequence of the sacrifice, not incurred. In case of loss of freight by jettison of goods, allowance must also be made for the freight of any cargo which the shipowner has been able to obtain in substitution for the goods jettisoned (*l*).

(*e*) Benecke, Pr. of Indem. 292.
(*f*) 2 Phillips, s. 1366.
(*g*) 1 Emerigon, c. xii. s. 40, p. 597; Code de Commerce, art. 429.
(*h*) *Ibid.*
(*i*) Benecke, Pr. of Indem. 294.
(*k*) Laws of Wisbuy, art. 43; Weijtsen, s. 33; Casaregis, Disc. 46, No. 49; and see 2 Phillips, Ins. s. 1372. Cf. Lebeau *v.* Gen. Steam Nav. Co. (1872), L. R. 8 C. P. 88.
(*l*) Lowndes, 295.

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Loss arising from sacrifices of part of ship.

Damage purposely inflicted on the ship for the general safety is to be estimated, for the purposes of adjustment, at the cost of the repairs, with deductions in proper cases for the old materials (*m*); where no repairs have been made, the damage must be a subject of estimation (*n*).

Where the value of the whole ship is to be contributed for, as in the case of her total loss by voluntary stranding, with a saving of the cargo, the measure of the loss, for the purposes of adjustment, was considered by Phillips to be the value of the ship to her owner at the time she ran aground. Similarly her freight should be contributed for at its gross amount at the port of destination (*o*).

Loss incurred by goods sold for the general benefit.

The amount at which goods sold for the general benefit are to be paid for in contribution is, if the voyage is subsequently completed, the net value they would have fetched at the port of discharge, or, at the option of the owner of the goods, the sum actually realized at the intermediate port: if the voyage is not subsequently completed, the latter amount (*p*).

Loss by raising money on credit, &c.

When money is raised abroad, by bills or otherwise, for the sake of defraying expenses of the nature of general average, the amount actually expended is the amount to be contributed for, including interest, both marine and ordinary, and all loss by discount on bills and by the rate of exchange (*q*).

Mode of estimating the value of the property saved for the

983. Having thus seen the mode in which the property sacrificed is to be valued for the purposes of general average adjustment, let us now see what valuation is put, for the same

(*m*) As to deductions from cost of repairs according to York-Antwerp Rules, 1890, see Rule XIII. (Appendix D.).

(*n*) As to which see Henderson *v.* Shankland, [1896] 1 Q. B. 525. It is doubtful, however, whether the decision of the Court as to disallowance of the deduction of one-third new for old can be logically justified; see *post*, s. 1025.

(*o*) 2 Phillips, Ins. ss. 1368, 1369; and see Henderson *v.* Shankland, *ubi supra*.

(*p*) Phillips, Ins. s. 1363. See Depau *v.* Ocean Ins. Co. (1825), 5 Cowen, 63; Richardson *v.* Nourse (1819), 3 B. & Ald. 237; Atkinson *v.* Stephens (1852), 7 Exch. 567; 21 L. J. Ex. 329. See also Hopper *v.* Burners (1876), 1 C. P. D. 137; and Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426. Benecke, however, dissents (Pr. of Indem. 274).

(*q*) Benecke, Pr. of Indem. 250; 2 Phillips, Ins. ss. 1359, 1360.

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purposes of general average adjustment.

purposes, upon the property saved; in other words, let us inquire what is its contributory value. The general principle of valuation is simply this (*r*): "that the value of the property to its owners, as saved by the sacrifice or the expenditure, is the value upon the footing of which it ought to contribute towards making good the loss"; or, as the rule is frequently given, "the contributory value of the different interests is their value to their owner at the time and place to which the apportionment relates."

The rule of computation should differ in case of sacrifices and expenditures.

Simple, however, as this principle is, its practical application has given rise to considerable difficulties, which have chiefly arisen from not sufficiently bearing in mind the distinction, already noticed, between the mode of adjustment to be adopted in the case of sacrifices, and that which is pursued in the case of expenditures.

In the case of expenditures, we have shown our reasons for thinking that contribution is due from the moment of the outlay, and is payable in all events, whatever may be the subsequent fate of the adventure: in these cases, therefore, the time and place to which the apportionment relates should be the time and place of the disbursement, and the contributory value, therefore, of the property saved, should be the sum it was worth to its owner at the time and place at which the expenditure was incurred (without reference to any subsequent deterioration which may have taken place before its arrival in port (*s*)).

It is different, however, in the case of sacrifices. There, as we have also seen, the property at risk when the sacrifice was made is not considered as saved, so as to be subject to contribution, until its arrival at the place of adjustment. This place ought, whenever practicable, to be the port of discharge, and the time that of the ship's arrival there. Hence the rule, that in case of losses arising from sacrifices, the contributory value of the different interests saved thereby is their net value

(*r*) Cf. York-Antwerp Rules, 1890, rule xvii. (Appendix D.).
(*s*) See *ante*, s. 977.

Sect. 983. in the state in which they actually come into their owner's hands at the port of destination (*t*).

Accordingly, where the loss to be adjusted has arisen partly from sacrifices and partly from expenditures, the contributory value of the property saved ought, in theory, to be estimated on two different principles. Phillips considered, indeed, that this is the true rule to be followed in practice (*u*). Arnould (*x*) considered that to do so would involve a degree of difficulty and embarrassment inconsistent with the exigencies of actual business. Lowndes (*y*), however, does not see where any such practical difficulty lies. Nevertheless the ordinary practice amongst average adjusters in this country is to regard only the state of affairs existing at the time and place of adjustment, whether in dealing with cases of sacrifice or expenditure; but this rule is not universally followed (*z*).

Ordinary practice of adjusters.

In what follows, unless otherwise expressed, the loss to be made good by the contribution is assumed to be loss arising from sacrifices.

Principle of valuation of ship for the purposes of contribution.

984. Agreeably to the principles already laid down, we shall find it everywhere acknowledged that the ship is to be estimated for the purposes of contribution solely with reference to her value as finally saved by the sacrifice, that is, her worth to her owner at the time and place of adjustment (*a*).

(*t*) Stevens, Average, 49.

(*u*) 2 Phillips, Ins. s. 1377.

(*x*) 2nd ed. p. 951.

(*y*) Lowndes, General Average, 270, n. (*z*): "There must be one adjustment, but there can easily be two apportionments, on different contributory values, followed by a balance of account or a simple sum in addition. Much greater complications than this are often dealt with by adjusters without difficulty."

(*z*) Lowndes, 260.

(*a*) Stevens, 63; Benecke, Pr. of Indem. 311; 2 Phillips, s. 1379; Baily, Gen. Average, 141—144. If, however, repairs have been done before the adjustment, the value of such repairs must be deducted. And where the sacrifice in respect of which contribution is to be made was a sacrifice of ship, the amount allowed in general average in respect of such sacrifice must be added. See Carver, s. 422; Lowndes, s. 69; and cf. Henderson *v.* Shankland, [1896] 1 Q. B. 525. Where the ship is actually sold, the price she fetched is *primâ facie* evidence of her contributory value (Bell *v.* Smith (1806), 2 Johnson, R. 98); but the saleable value is not necessarily conclusive—*e. g.*, in the case of vessels of a peculiar build, and designed for a

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Difficulty of fixing a practical rule.

There is no dispute about the general principle; but there has been great difficulty in adopting any practical rule of valuation, a difficulty arising principally from the fact that the ship, generally speaking, is not, like the goods, actually sold at the port of destination. The method of valuation, in the absence of a sale, has been very generally, but very variously, fixed by the positive laws of almost all mercantile states (*b*), but in our own country we have no fixed rule upon the subject. The adjuster must ascertain the figure as well as he can—either, where there is a market for similar vessels, by estimation of her market value, or, where there is not, by considering her first cost, and then making proper allowances for wear and tear, changes in the cost of construction, materials and the like, which might either enhance or diminish her value at the date of adjustment (*c*).

Principle on which freight contributes in general average, and by which its contributory value is ascertained.

985. The principle upon which freight is to contribute in the case of general average is, that it was one of the things at hazard at the time when that sacrifice was made which produced the general average loss (*d*); and the principle upon which its contributory value is assessed is the same as in the case of the ship, viz., that the amount to contribute is the amount eventually saved by the sacrifice.

From these two principles it follows, 1. That freight, in order to be contributory at all, must have been pending at the time of the sacrifice; 2. That the true contributory value of freight is the actual sum finally received as freight by the shipowner after deducting such of the expenses of earning it as would have been saved if the vessel had been lost at the time of the sacrifice (*e*).

particular trade, for which, therefore, there is no market. Cf. Grainger *v.* Martin (1862), 31 L. J. Q. B. 186; 4 B. & S. 9.

(*b*) Lowndes, with his usual industry, has collected the different regulations on this point. See Comparative Table at the beginning of his work on General Average, and Appendices at the end.

(*c*) See Lowndes, General Average, s. 69; cf. Stevens, Average, 53; 2 Phillips, s. 1379.

(*d*) Per Lord Ellenborough in Cox *v.* May (1815), 4 M. & S. 159.

(*e*) Stevens, 63; 2 Phillips, Ins. s. 1385; Lowndes, ss. 71, 75; The Brigella, [1893] P. at p. 196.

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The shipowner only contributes in respect of freight pending at the time of the sacrifice, and saved thereby.

986. From the first principle it follows, and has been decided in the United States, that if the cargo or a part of it has been delivered before the sacrifice took place, the freight due in respect thereof does not contribute (*f*). Freight paid in advance, not to be recovered back by the shipper in any case, does not contribute *quâ* freight, because it is not at risk. But a contribution in respect of the amount so paid in advance is levied upon the shipper or consignee of the goods, either directly, in respect of the interest called advance freight, or indirectly, in respect of the extent to which the value of the goods is by such payment in advance deemed to be enhanced (*g*). If the ship is wrecked near the port of loading, so that the goods are taken back there and the general average is there adjusted, the advance freight, being totally lost, will not contribute at all. Cargo belonging to a shipowner will contribute in respect of its enhanced value by having been carried up to the point where the general average act took place (*h*). If only freight *pro ratâ itineris* is earned, that alone contributes (*i*). On the same principle, where a ship was chartered at so much a month to sail on successive passages, and the general average loss happened in the course of the last passage, it was held in the United States that the freight on which contribution was to be assessed was that earned in the last passage only, as that alone was the freight which would have been lost but for the sacrifice (*k*).

(*f*) Dunham *v.* Commercial Ins. Co. (1814), 11 Johns. 315; Strong *v.* New York Firemen's Ins. Co. *ibid.* 323, cited Phillips, Ins. s. 1385.

(*g*) Trayes *v.* Worms (1865), 34 L. J. C. P. 274; Lowndes, s. 71. Mr. Carver thinks that in such a case the contribution is paid in respect of an interest in the cargo rather than in the freight: Carriage by Sea, s. 440. And this view was elaborated in an address delivered by him to the Association of Average Adjusters, 12th May, 1893 (printed by Ferry & Sons). But it is not by any means clear that the value of cargo shipped is in any way actually enhanced by the mere prepayment of freight. The editors rather incline to the other opinion, viz., that a separate interest is thereby created, which is insurable either as advance freight, *eo nomine*, or generally as disbursements on cargo.

(*h*) Lowndes, s. 71.

(*i*) Maggrath *v.* Church (1803), 1 Caines, 196.

(*k*) Spafford *v.* Dodge (1817), 14 Mass. R. 66; 2 Phillips, Ins. s. 1387.

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Where a ship is chartered for an entire voyage out and home, what freight contributes?

In Williams *v.* London Ass. Co. (*l*), a ship was chartered for the voyage out and home, under a stipulation that no freight was to be paid for the homeward voyage unless she performed her voyage out and home, and arrived at her port of departure in safety. An insurance was effected on the ship for the outward voyage only, and in the course of this outward voyage a general average loss was incurred: before the trial the ship had arrived at her home port of departure and earned full freight. The question for the Court was whether under these circumstances the whole freight was liable to contribute for the general average incurred on the outward voyage: the Court held that it was, on the ground that the whole freight payable under the charter-party was one entire and indivisible sum, payable for the use of the ship out and home; therefore, when ultimately earned, having been put to hazard and saved by the measures taken for the general benefit, it ought to contribute (*m*).

The Court laid great stress on the fact that the freight had actually been earned before the trial; even under this limitation Benecke dissented from the authority of the case, on the ground taken by the counsel for the assured in argument, viz., that the homeward freight can in no case be liable for general average incurred on the outward voyage. Arnould (*n*) also doubted whether the case could, on principle, be supported (*o*). To the present editors, however, the decision appears correct, on the ground that the whole freight was at risk, and was eventually saved. Where the freight is apportioned in the charter-party between the outward and homeward parts of the voyage, it would seem that the whole

(*l*) (1813), 1 M. & S. 318.

(*m*) Williams *v.* London Ass. Co. (1813), 1 M. & S. 318. See per Bayley, J., 327.

(*n*) 2nd ed. p. 956.

(*o*) Benecke, Pr. of Indem. 316. See also 2 Phillips, Ins. s. 1387, and Baily, Gen. Average, 150—153. The decision is supported by Lowndes, s. 71, on the principle that whenever there is a freight which can be insured, there is a freight to contribute in general average. Mr. Carver, s. 438, asks what should have been done if the average had been adjusted at the end of the outward voyage. But the answer seems to be that the proper place for adjustment was where it actually took place, *i.e.*, at the home port.

Sect. 986. or a part should contribute according as the general average loss occurred on the outward or homeward passage. *A fortiori* it would be so if the outward and homeward passages were separate voyages, whether under the same charter-party or not.

Contribution of chartered freight to general average.

987. The question of the liability of chartered freight to contribute to general average is carefully discussed by Lowndes. He divides charter-parties for this purpose into three classes:—Firstly: Where the vessel is chartered to fetch or carry cargo belonging to the charterer. In this case his view is that the chartered freight contributes, whether or not there is any cargo on board at the time of the general average act. If, as is often the case, the charter-party provides that the ship shall go to a foreign port to bring home cargo for the charterer, and liberty is granted to the shipowner to ship an outward cargo for his own benefit instead of sending the vessel out in ballast, Lowndes is still of opinion that the chartered freight should contribute, expressing no view as to the liability of the shipowner also to contribute in respect of the profit which he may derive from the liberty so reserved to him. It seems clear, however, that in such a case the shipowner is also liable.

Secondly: Where the charterer hires the ship for a voyage, intending to make what he can out of the adventure by letting out her space to shippers to the best advantage. In this case the chartered freight is the subject of contribution until an insurable interest is acquired in the cargo which it is intended to carry; afterwards it is the actual bill of lading freight contracted for (*p*).

Thirdly: Where the vessel is hired for time, or for a series of voyages, by a charterer who proposes to work her for his own profit as owner. Here Lowndes' view is that the chartered freight, unless the contract is a peculiarly beneficial

(*p*) This is apparently in accordance with the practice of average adjusters. But if the bill of lading freights were to amount to less than the chartered freight, it is difficult to see why the latter, if it has been saved by the sacrifice, should not be the freight to contribute.

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one for the shipowner, is in reality all part of the value of the ship. A ship is meant to be sailed and to earn freights, and whether or not she is enhanced in value by her future engagements, or whether or not her owner loses anything in addition to her value by losing his ship, depends on what the nature of her future engagements may happen to be. It is only in respect of such enhancement in value, if any, that the shipowner should, in Lowndes' opinion, be required to contribute to general average as for freight.

Ulterior chartered freight.

988. Lowndes does not treat expressly of the general question as to a shipowner's liability to contribute for freight expected to be earned by the vessel's engagements for the future. A vessel may, at the time of a general average act, be performing one contract of carriage, and may have one or more separate engagements booked for some time in advance. From the view, however, which he expresses as to his third class of charter-parties, it appears that the primary subject of contribution would be the freight actually being earned, and that the future freights would only contribute in respect of the extent to which the contracts relating to them enhanced the value of the ship. The Association of Average Adjusters agree that the present freight should contribute, but exempt all other, by providing "that when at the time of a general average act the vessel has on board cargo shipped under charter-party or bills of lading (*q*), and is also under a separate charter to load another cargo after the cargo then in course of carriage has been discharged, the ulterior chartered freight shall not contribute to the general average."

Only the net freight, after deducting all expenses of earning it, is to contribute.

989. From the second principle it follows that, in order to ascertain the amount at which freight ought to contribute, the wages of the master and crew earned between the date of the sacrifice and the termination of the voyage (*r*) ought to be

(*q*) The rule does not expressly provide for the case where the ship is subject to the first charter-party, but no cargo has actually been shipped thereunder. But it is conceived that the same principle would be applied.

(*r*) Lowndes, s. 75.

Sect. 989. deducted from the gross amount of the freight, for they are part of the necessary expenses of earning freight, and must, in any case, be paid out of it (*s*).

On the same principle, where the first ship is disabled, and the cargo is sent on in a second, the excess of freight for the entire voyage, over that paid to the substituted ship, alone forms the contributory value of freight. Hence, where the shipowner, in such case, is obliged to pay the same or a higher freight for the hire of the second ship than he was to receive for the use of the first, then, in case the loss occurred before the transhipment, no contribution is due for freight, because no freight in such case is finally received by the shipowner, or saved by the sacrifice (*t*). The practical rule, therefore, is, that freight contributes to general average upon its net value, after deducting the wages of the master and crew (*u*).

Goods contribute on their net value at the time and place of adjustment.

990. Like ship and freight, goods contribute upon the value finally saved out of what was at risk at the time of the sacrifice; in other words, upon the value of the goods as they come into the hands of their owners, at the place and time of adjustment (*x*).

The port of adjustment is generally the port of destination.

That place, if possible, is the port of discharge, and the time of making it is as speedily as possible after the ship's arrival there. Hence, the general practical rule is, That goods contribute on their actual net value, *i.e.*, on their market price at the port of adjustment, less freight, duty and expenses of landing (*y*).

But it may be the port of departure.

In case of a general average loss at the outset of the voyage, and of the ship in consequence putting back into the

(*s*) Stevens, Average, 63; 2 Phillips, s. 1389.

(*t*) So decided in America. Searle *v.* Scovell (1819), 4 Johns. Ch. C. 218; Phillips, Ins. s. 1388.

(*u*) The rule of practice adopted by the Association of Average Adjusters is: "That freight at the risk of the shipowner shall contribute to general average upon its gross amount, deducting the whole of, and no more than, such port charges as the shipowner shall incur after the date of the general average act, and such wages of the crew as the shipowner shall become liable for after that date."

(*x*) Benecke, Pr. of Indem. 298; Stevens, Average, 49.

(*y*) Stevens, Average, 48; Benecke, Pr. of Indem. 301; 2 Phillips, Ins. s. 1394; Lowndes, s. 70.

port of loading, the adjustment should be settled there; and in such case the contributory value of the goods will be "their cost on board without insurance," *i.e.*, the amount of tradesmen's bills and shipping charges, "such being the value at risk" (*z*). Sect. 990.

When the adjustment is settled abroad, the contributory value of the goods should be their market price at the foreign port if this be ascertainable; if not, their value there, to be estimated in the best way possible, as in case of ship (*a*).

The value of the goods jettisoned or sold must be added to the value of the goods saved.

If the sacrifice to be contributed for consists of a jettison or sale of goods for the general benefit, then, on the principle already illustrated in the case of ship and freight, the estimated net value of the goods jettisoned or sold must be added to the net value of the goods saved, and the whole will be the contributory value of the goods (*b*).

Thus, let the net value of the goods saved, deducting freight, be	£1,000
Add net value of the goods jettisoned, &c., deducting freight, &c.	100
Value of goods to contribute	£1,100

Damaged goods must be taken at their damaged value, unless the damage be caused by the sacrifice.

In whatever way the goods saved are deteriorated or damaged, by the perils of the sea, after the sacrifice, they must, of course, be taken at such deteriorated value, for such is their value as finally saved (*c*); if, however, they have been damaged by the very sacrifice for which contribution is claimed, then they must be taken at their value as sound, for this damage is made good to them in contribution (*d*).

Freight paid in advance.

When the shipper pays freight in advance at the outset of the voyage the owner of the goods contributes in respect

(*z*) Fletcher *v.* Alexander (1868), L. R. 3 C. P. 375; Stevens, Average, 47; Lowndes, s. 70; and cf. 2 Phillips, s. 1365, and case there cited, *ante*, s. 981, note (*b*).

(*a*) Cf. *ante*, s. 984.

(*b*) Stevens, Average, 48.

(*c*) Fletcher *v.* Alexander (1868), L. R. 3 C. P. 375; Benecke, Pr. of Indem. 298.

(*d*) Stevens, Average, 48.

Sect. 990. thereof (*e*). Whether or not such contribution is properly regarded as an additional tax upon the goods is not clear (*f*).

Example of a general average adjustment.

991. By way of illustrating what has preceded, the following example, in figures, of a general average adjustment, settled after the ship's arrival at her port of destination, is taken, with a few alterations, from Abbott on Shipping :—

Valuation of Losses.		Value of Articles to contribute.	
Goods of A. jettisoned.....	£500	Goods of A. jettisoned	£500
Damage done to goods of B. by the jettison	200	Net value of the goods of B., deducting freight and charges, and including amount made good in general average	1,000
Freight of A.'s goods jettisoned	100	Ditto of the goods of C.	500
Price of a new cable, anchor and mast..... £300		Ditto ditto D.	2,000
Deduct one-third new for old (*g*) 100		Ditto ditto E.	5,000
	200	Value of the ship £2,000	
Expense of bringing the ship off the sands	50	Net freight, deducting wages and charges.. 800	
Pilotage and expenses of going into and out of the port where the ship put in to refit	100		2,800
Expenses there (*h*)	25		
Adjusting this average	4		
Postage	1		
Total amount of losses to be contributed for £1,180		Total of contributory values..£11,800	

Then, as 11,800*l.* : 1,180*l.* :: 100*l.* : 10*l.*, therefore each

(*e*) Trayes *v.* Worms (1865), 34 L. J. C. P. 274; Benecke, Pr. of Indem. 314. Arnould (2nd ed. p. 959, following Phillips, vol. ii. s. 1401) was of a contrary opinion. The point, however, seems now to be settled by the case above cited. As regards freight at the risk of a charterer, it is expressly provided by a rule of the Association of Average Adjusters that no deduction shall be allowed for wages and port charges except in the case of charters in which the wages and port charges are payable by the charterer.

(*f*) See *ante*, s. 986, n. (*g*).

(*g*) Only one-sixth is now allowed in respect of cables, and nothing off the price of a new anchor.

(*h*) The loss, to repair which the ship put in to refit, being general average, and assuming Atwood *v.* Sellar ((1880), 4 Q. B. D. 342; 5 Q. B. D. 286) to be good law.

person will lose 10 per cent. on the value of his interest in ship, freight, and cargo. Sect. 991.

Thus A. loses 50*l.*, B. 100*l.*, C. 50*l.*, D. 200*l.*, E. 500*l.*, the shipowners 280*l.*

The shipowners, therefore, are to pay towards the contribution 280*l.*; but they are to be paid 480*l.* (*i.e.*, freight, 100*l.*; mast, cable, and anchors sacrificed, 200*l.*; disbursements, 180*l.*) : on the whole, therefore,

	£
The shipowners are actually to receive - - -	200
A. contributes 50*l.*, but is to be paid 500*l.*—actually receives - - - - - - - - -	450
B. contributes 100*l.*, but is to be paid 200*l.*—actually receives - - - - - - - - -	100
Total to be actually received - -	£750
On the other hand, C., D., and E. have lost nothing, and are to pay as before, viz. :— C. - - -	50
D. - - -	200
E. - - -	500
Total to be actually paid - - -	£750

This amount is exactly equal to the total to be actually received, and must be paid to each person entitled to contribution in rateable proportion.

992. The proper place for the adjustment of general average is, as we have already seen, the ship's port of destination or discharge. It often happens, however, that a ship may have more than one destination, and be carrying cargo to be discharged at more than one place, and even at places in different countries with different laws. In such a case the questions as to where an adjustment is to take place, on what values, and according to what law, are some of many difficult points that may arise, and there is no judicial authority on the subject. It is, however, discussed very clearly and care-

Place of adjustment and foreign adjustment. Where should a loss be adjusted where the vessel is carrying cargo for different destinations?

Sect. 332. [illegible] Mr. Lowndes [illegible] in which pages the reader is referred. Mr. Lowndes's view on the whole is that the ultimate port of the voyage should be a rule to be regarded, and that the adjustment should be there made on the basis of the national rules. He gives a useful illustration of what would happen in a vessel case of some importance, where, however, the adjustment was agreed to without litigation. Apart from any implication as to this matter, the rule is, that where the port of destination happens to be a foreign port, the general average loss is adjusted there, according to the law and usage of the country to which such foreign port belongs; and the adjustment so made is called a foreign adjustment (*g*). If the adventure be broken up at an intermediate port, either of necessity or by consent of the parties, that port becomes in effect the port of discharge, and the place therefore for adjusting the general average. But in the absence of proof of the termination of the voyage by necessity or consent at an intermediate port, an adjustment made at such port without the express consent of all parties concerned will not be binding on them (*h*).

It has also been already observed that there is great diversity in the practice of different countries with regard to what shall or shall not be included in general average; sometimes losses are included and charged for which are general average in the country where the adjustment is settled, but not so in the country where the charter-party was entered into and the policy of insurance effected; and sometimes a *different proportion* of contribution is assessed in the foreign port from what would, under similar circumstances, have been assessed in the home port.

(*i*), Carriage by Sea, s. 425.

(*j*), Gen. Av. pp. 271—275, s. 62.

(*k*), Simmonds *v.* White (1824), 2 B. & Cr. 805.

(*l*), As to what justifies the termination of the voyage at an intermediate port, cf. Fletcher *v.* Alexander (1868), L. R. 3 C. P. 375; Mavro *v.* Ocean Marine Ins. Co. 1874, L. R. 9 C. P. 595; 10 C. P. 414; and, for an extreme case upon the facts, see Hill *v.* Wilson (1879), 4 C. P. D. 329.

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993. In either case two questions arise:—First, are the co-adventurers themselves bound by the foreign adjustment? Secondly, are the underwriters bound by it?

The parties to the adventure are bound by a foreign adjustment.

With regard to the first question there is now no controversy amongst jurists, for, as it is expressed by Story, J., "When a case of general average occurs, if it is settled in the foreign port of destination, or in any other foreign port where it rightfully ought to be settled, the adjustment there made will be conclusive as to the items, as well as the apportionment thereof upon the various interests, although it may be different from what our own law would have made in case the adjustment had been settled in our own ports" (*m*).

Thus where, on an adjustment settled at St. Petersburg, the owners of the cargo (British subjects) had been compelled (in order to get possession of their goods) to pay a contribution assessed upon them for the expenses of repairs, which were general average in Russia but not in this country, it was held that they could not recover it back from the shipowner, who was himself a British subject (*n*).

The same decision was given in a case, also arising upon a Russian adjustment, where the contribution was for wages and provisions during a refitment, which, as we have seen, are not general average in this country; here also the action was brought by the owner of the goods to recover back the sum so paid against the shipowner, and with the like result (*o*).

Reason of the rule.

The reason of the rule is thus given by Lord Tenterden (in the course of his judgment in the case of Simmonds *v.* White): "The shipper of goods tacitly, if not expressly, assents to general average, as a known maritime usage, and by assenting to it he must be also taken to assent to its adjustment at the usual and proper place, according to the usage and law of the place" (*p*).

(*m*) Peters *v.* Warren Ins. Co.; see 2 Phillips, Ins. s. 1413.

(*n*) Simmonds *v.* White (1824), 2 B. & Cr. 805.

(*o*) Dagleish *v.* Davidson (1824), 5 Dowl. & Ryl. 6.

(*p*) 2 B. & Cr. 810.

Sect. 382. The law in this respect in the United States [illegible].

The underwriter is bound by a foreign adjustment, when settled according to the law and usage of the foreign port.

384. With regard to the general question, whether the underwriter in this country is bound by a foreign adjustment, many differences have been raised, and it has been frequently controverted in the courts of considerable practice in this country. It is in this country and the United States, that the underwriters should not be found by a foreign adjustment, which either the terms of the law or the modes of any proceeding are different from what they would have been had the adjustment been settled in a home port [r].

There have not been very many decisions on this point in English Courts—at least none of the last time it is now, and but a few since the regular practice to insert in policies a special clause, known as the Foreign General Average Clause, by which the parties expressly provide for the conclusiveness of an adjustment being made abroad. The effect of this clause will be discussed later. At present the point for consideration is as to the binding nature of a foreign adjustment, where there is no such clause in the policy.

The true rule, to be gathered from general reasonings and from the tenor of the few decisions there are on this subject, appears to be this:—

1. That the underwriter is in all cases bound by a foreign adjustment of general average, when it is rightly settled according to the laws and usages of the foreign port [s];

2. But that, unless it is clearly proved to have been settled in strict conformity with such laws and usages, he is in no

[q]. 2 Kent, Com. 243.

[r]. See, especially, Stevens, Average, 71. 72. Phillips appears to admit that the underwriters would be bound, even though the contribution should be differently apportioned, provided the losses adjusted as general average would be either general or particular average at the home port, but not otherwise. 2 Phillips, Ins. s. 1414.

[s] Provided always that the loss which is declared by the foreign adjustment to be general average arose from a peril insured against. See Harris v. Scaramanga (1872), L. R. 7 C. P. per Brett, J., at p. 496, citing 2 Phillips, Ins. ss. 1353, 1409, 1414.

case bound thereby, if it would not be general average in this country. Sect. 994.

995. Thus, where the assured (owner of goods) had been compelled to pay, under a foreign adjustment settled at Pisa, in respect of losses, some of which would not have been general average in this country, and upon contributory values, differently computed from what they would have been in this country (the goods being assessed at their full value, the ship at one-half, the freight at one-third), yet, as it clearly appeared in evidence that all the losses in respect of which the claim was allowed were general average at Pisa, and that the apportionment of loss was correct according to the mercantile usage of that place, the assured was allowed to recover against his underwriter the full proportionable amount of his claim (*t*). Cases in which a foreign adjustment has been held binding. Newman *v.* Cazalet.

So, where the holder of a respondentia bond (on a Danish ship), who would not have been liable to general average at all in this country, was compelled to pay a contribution under a foreign adjustment, settled in Denmark, satisfactory evidence having been given that it was the law and practice in Denmark that holders of respondentia bonds should contribute in general average, he recovered against his underwriters (*u*). Walpole *v.* Ewer.

In both these cases there was clear evidence that the adjustment was correct according to the law and practice of the port where it was settled, and it was also clear that the port where it was in fact settled was the proper port for settlement. If, however, either of these facts be not satisfactorily established, the underwriter will not be bound by the foreign adjustment, whenever, either in the items or the apportionment of the loss, it differs from what it would have been if settled in his own country (*x*). Where, however, it is not a proper case of general average according to the laws and usages of the foreign port, the underwriter is not bound by a foreign adjustment.

996. Thus, where the owner of goods insured from London

(*t*) Newman *v.* Cazalet, 2 Park, 900.

(*u*) Walpole *v.* Ewer (1789), 2 Park, 898.

(*x*) Hill *v.* Wilson (1879), 4 C. P. D. 329; 2 Phillips, s. 1414.

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Power v. Whitmore.

to Lisbon was compelled, under a foreign adjustment settled in Lisbon, to pay a contribution for losses which, according to the laws of this country, do not belong to general average—and no sufficient proof was given that by the laws and usages of Lisbon such losses were treated as general average there—it was held that the owner of the goods could not recover from his underwriter his proportionable amount of the sum so paid (*y*).

It by no means follows from this case, as has been sometimes supposed, that underwriters in this country can in no case be bound by a foreign adjustment; for Lord Ellenborough puts his judgment entirely on the ground that the case contained no allegation of fact, as to its being the law or usage at Lisbon to treat losses and expenses of the kind charged for as the subjects of general average.

Harris v. Scaramanga.

Finally, the view of the law as above stated was confirmed in Harris *v.* Scaramanga: "Now, I think, it is clearly established that upon such a policy" (*i.e.*, a policy containing no special foreign adjustment clause) "English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made. They are bound, although the contributions are apportioned between the different interests in a manner different from the English mode, or though matters are brought into or omitted from general average which would not be so treated in England" (*z*).

The law in the United States upon this subject appears to be to the same effect (*a*).

(*y*) Power *v.* Whitmore (1815), 4 M. & S. 141.

(*z*) Harris *v.* Scaramanga (1872), L. R. 7 C. P. at p. 495, per Brett, J. In Hendricks *v.* Australasian Ins. Co. (1874), L. R. 9 C. P. at p. 468, the same learned Judge seems to use expressions to a somewhat different effect. See also Mavro *v.* Ocean Mar. Ins. Co. (1874), L. R. 9 C. P. 595; 10 C. P. 414; Stewart *v.* West India Co. (1873), L. R. 8 Q. B. 88, 362; The Mary Thomas, [1894] P. 108.

(*a*) 3 Kent, Com. 243; see also the cases collected in 2 Phillips, Ins. s. 1414. Phillips classifies the cases under three heads: 1. Where the foreign adjustment merely varies the proportions of the contribution. 2. Where it brings into general average what by the *lex loci contractûs*

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The Foreign Adjustment Clause.

997. Such, then, being the position apart from any special clause in the policy, it now remains to consider the effect of the foreign general average clause above referred to. This clause runs substantially as follows: "General average and salvage charges payable as per official foreign adjustment if so made up (or per York-Antwerp Rules), if in accordance with the contract of affreightment." In order to determine the effect of the clause, it is necessary to consider the object with which it was introduced into policies. Now, as regards this point, there have been two views: (1) That, there being doubts as to whether the cases above cited from Park (*b*) sufficiently established the law as above laid down, the clause was only inserted in order to remove all such doubts, or, in other words, in order to avoid running the risk of the Pisa (*c*) case being considered bad law. (2) That the clause was intended to do something more, and to give the foreign adjustment some further effect than had been given to it by the decisions on policies which did not contain such a clause.

Its object.

In support of the former of these two views, arguments of considerable strength could undoubtedly be urged, and such was apparently the view of Lord Blackburn (*d*). But the expressions of his Lordship in which this view is indicated can hardly be regarded as entitled to more weight than is usually assigned to *obiter dicta*, whereas the latter view is clearly the basis of the decision of the Court in Harris *v.* Scaramanga (*e*). It seems, therefore, that the latter view must be considered as the authoritative view of our Courts.

It has already been observed that even in cases where there is no foreign adjustment clause, a foreign adjustment, if properly made, binds an English underwriter, even though

is particular average, and *vice versâ*. 3. Where it brings into general average what, by the *lex loci*, is neither general nor particular average. Admitting the liability of the underwriter in the two former classes of cases, he disputes it in the third. See also Baily, General Average, 199.

(*b*) Newman *v.* Cazalet and Walpole *v.* Ewer, *ubi supra*.

(*c*) Newman *v.* Cazalet.

(*d*) See Mavro *v.* Ocean Co. (1875), L. R. 10 C. P. at p. 418. See also McArthur, Mar. Ins. 208.

(*e*) See especially the judgment of Brett, J., L. R. 7 C. P. at p. 498.

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the contribution is thereby assessed in different proportions than it would have been assessed by English law, and even though matters are thereby included or excluded as general average which English law would have treated differently. But there is under such circumstances one defence open to the underwriters, notwithstanding the foreign adjustment, viz., to show that the loss, which is declared by such adjustment to be general average, did not arise from any of the perils covered by the policy. It has been decided that the insertion of the foreign adjustment clause has the effect of depriving the underwriter even of this defence.

The Foreign Adjustment Clause makes the underwriter liable even where the general average was not due to perils insured against. Harris *v.* Scaramanga.

998. The point arose in Harris *v.* Scaramanga, where it appeared that the foreign adjustment not only assessed contribution on different principles from English law, but also included, under the head of general average, losses and expenses which, whether or not properly the subject of contribution as between the ship, cargo and freight, would not apart from the clause be recoverable from underwriters, inasmuch as they arose from perils which were not insured against at all. The underwriters objected to such an extension of their liability under the policy as would compel them in effect to indemnify against perils, the risk of which they had not undertaken. The Court, however, determined that the clause had this wide effect. The facts of the case were as follows:—A cargo of rye was insured from Taganrog to Bremen. The policy contained the usual memorandum, "Corn, &c. warranted free from average unless general, or the ship be stranded," &c.; and in the margin were the following conditions:—"To pay general average as per foreign statement, if so made up. Warranted free from particular average unless the ship be stranded, &c. Warranted free from capture and seizure." After leaving Taganrog, the vessel having encountered severe weather was compelled to put into two several ports for repair, at each of which the captain, in order to obtain funds to put her in a condition to continue her voyage, gave a bottomry bond on

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ship, freight and cargo. On arrival at Bremen the consignees of the cargo paid the whole amount in order to obtain delivery, the captain having no funds. The ship was eventually sold at the instance of the consignees, but sold for 663*l.* less than was certified by the average stater at Bremen to be the ship's proportion of liability on the bonds. A supplemental average statement was subsequently made at Bremen, in which this sum was stated as "the amount which the cargo had to pay as additional bottomry debt" to the holders of the bonds, and it was admitted that "such a loss is treated at Bremen as a general average loss, and not as a particular average loss." The action was brought upon the policy to recover the 663*l.* as for a general average loss, stated so to be by the foreign adjustment. The main defence was that even assuming the loss to be a general average loss by the law of Bremen, it was not due to any peril insured against, but merely owing to the want of funds of the captain. Bovill, C. J., however, delivering the judgment of himself and Keating, J., held that the question, whether the claim in this case was to be considered as general average for which the underwriters were liable, was to be determined not by the Court, but by the foreign stater. "It seems to me that the general effect of the memorandum is to make the underwriters liable, as for general average, for whatever the owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. This memorandum was probably introduced in order to avoid all questions, not only as to the propriety of particular items being treated as the subjects of general average, but also as to the correctness of the apportionment." "Under the terms of this policy, the underwriters and the assured have both agreed to accept the adjustment and statement of the average stater in the foreign port, if and when made, as conclusive between them, both in principle and details, as to the loss which the underwriters are to undertake in respect of general average, subject to the exception of any matters, such as capture or seizure, which

Sect. 968. are excluded by the express terms of the policy" (*f*), and later (*g*), "If the defendants' contention be correct, it would equally have entitled them to dispute each item in the original average statement on the ground that it was not properly the subject of general average, or that it did not arise from any of the perils covered by the policy. But it appears to me that the intention and effect of the policy and memorandum were that all such questions should be excluded in all cases where a foreign statement of general average had been made up, as it was in this case, at the proper port of adjustment abroad; and that the underwriters by this policy, as between themselves and the assured, agreed to be bound by the opinion and decision of the foreign average stater, both as to facts and law, on the subject of the general average in the statement which he might make up in the foreign port."

Opinion of Brett, J., as to effect of Foreign Adjustment Clause.

969. The judgment of Brett, J., is more decisive. He agreed that the loss was not a general average loss by English law, and that it was not due to a peril insured against. He then expresses the opinion, after discussing such authority as there is on the point, that even where a policy contains no foreign adjustment clause an English underwriter is bound by the terms of a foreign adjustment to pay what such adjustment declares to be general average, though not general average by English law; but that this liability only attaches where the general average loss is due to a peril insured against. Such being the effect of an ordinary policy, some additional effect, he continues, must be given to the clause, in order that its insertion may not be meaningless, and the only way to give such effect to the clause is to say that it was intended to meet such a case as the one before the Court. Where, therefore, by foreign law a loss is a general average loss, and where by such law a general average loss is, by the mere fact of its being a general average loss, properly chargeable to underwriters, whether or not the peril which caused such loss is covered by the policy in question, a

(*f*) L. R. 7 C. P. at p. 489. (*g*) At p. 491.

foreign adjustment which, in accordance with such law, charges the loss against an English underwriter is binding on the underwriter, if he has agreed to accept a foreign adjustment, even though he in his policy has never granted protection against the peril to which the loss was due (*h*). Sect. 999.

1000. It is not proposed to criticise this decision except by pointing out that the members of the Court were all of opinion that if the general average loss had been caused by a peril expressly excepted in the policy, such as capture or seizure, the underwriters would not have been liable in respect thereof, whatever might be the tenor of the foreign adjustment. If, however, this be conceded, why does not the same reasoning apply to the case of perils which are, it seems, equally excepted from the policy by being omitted therefrom altogether? And, generally, it seems strange that an owner of ship or cargo who has omitted to insure against a particular peril should nevertheless be entitled to claim against his underwriters for a loss by that peril, sustained in the first instance by the owner of some other interest, merely because he is considered abroad to be liable to contribute thereto, by the application of the doctrine of general average. Criticism of the rule.

1001. Where the foreign statement is made binding, it renders the underwriter liable not only to reimburse the assured in respect of contributions levied upon his interest in favour of the other interests, but also to make good to him his own contribution to a loss sustained by his own particular interest, which is particular average by English law, but general average under the adjustment. Thus, in Mavro *v.* Ocean Marine Insurance Co. (*i*), there was a partial loss both of ship and cargo under circumstances which constituted a case for general average contribution by foreign, but not by Foreign Adjustment Clause may make underwriter liable to pay particular average not covered by the policy, if it be general average by foreign law. Mavro *v.* Ocean Mar. Ins. Co.

(*h*) Harris *v.* Scaramanga (1872), L. R. 7 C. P. 481. It is difficult to see why, on the principle of this case, the claim in Greer *v.* Poole (1880), 5 Q. B. D. 272, could not have been recovered, had the amount only been included as general average in the foreign statement. See also Robinows *v.* Ewing's Trustees (1876), 3 Ct. of Sess. Cas. (4th series) 1134.

(*i*) (1874), L. R. 9 C. P. 595; 10 C. P. 414 (Exch. Ch.).

Sect. 1001. English, law. In an action on the policy brought by the cargo-owners, the defendants paid all the items stated by the foreign adjustment to be general average, except in respect of the damage to the cargo, relying, as regards the latter, on a "free from average, unless general" clause. Admitting the correctness of the decision in Harris *v.* Scaramanga, they nevertheless contended that the foreign adjustment which had been made in pursuance of a similar clause only applied so as to make them liable for the amount which the plaintiffs had paid by way of contribution to the damage sustained by the ship. The Court, however, held that the plaintiffs were also entitled to recover the loss suffered by the cargo itself.

Foreign Adjustment Clause binds assured as well as underwriter.

Although the adoption of the foreign adjustment clause has in most cases the effect of increasing the liability of the underwriter, yet there may be cases where the effect is the opposite. The adjustment when properly made is as binding on the assured as it is upon the insurer, and the former cannot turn round, in a case where it suits him to do so, and recover from his own underwriters, as particular average or otherwise, what the foreign statement has declared to be only recoverable as general average by a contribution from the other interests. Thus in "The Mary Thomas" a contribution to certain expenditures incurred by the shipowner, which were general average expenditures by foreign law, was assessed against the cargo. The shipowner was, however, unable to obtain payment from the cargo-owners, owing to the rule of law in the foreign country which precluded him from doing so where the loss was occasioned by the default of his own servants. He then endeavoured to reprobate the foreign statement and to recover the amount from his own underwriters. But this he was not allowed to do (*k*).

Moreover, the clause does not apply at all where there is *ab initio* no case for general average, and therefore no neces-

(*k*) The Mary Thomas, [1894] P. 108 (C. A.), distinguishing Dickenson *v.* Jardine (1868), L. R. 3 C. P. 639. It is doubtful whether Hick *v.* London Ass. Co. (1895), 1 Com. Cas. 244 (Mathew, J.), is quite consistent with this decision.

sity for a foreign statement, or question as to any place of adjustment (*l*). Sect. 1001.

1002. It is sometimes necessary to have a general average adjustment prepared abroad, though it may be possible and expedient to take the vessel, which has suffered the general average damage, in respect of which the adjustment is made, to a home port for repairs. The cost of the repairs must in this case, for the purposes of the adjustment, be a matter of estimate, which may easily be far greater or far less than the actual cost as subsequently determined. Suppose the estimate to exceed the actual cost, the result is that the shipowner obtains from the cargo a larger contribution than he is entitled to. As between the shipowner and the owners of the cargo, such a circumstance can give rise to no question, each party being deemed to have agreed to be bound by the amount of the estimate. But an interesting and difficult question then arises between the shipowner and his underwriters. Are the latter also bound by the estimate made for the purposes of the foreign adjustment, and therefore liable to pay the shipowner such proportion thereof as the value of the ship may bear to that of all the contributing interests? Or, secondly, are the underwriters only bound to pay the shipowner the ship's proportion of the actual repair bill? Or, thirdly, are the underwriters entitled to treat the contract as one of indemnity, and merely to pay the difference between the actual cost of the repairs and the amount already received from the cargo under the foreign adjustment? Where adjustment made abroad on an estimate of damage sustained.

1003. By way of illustration, let us suppose that in a case where ship, freight and cargo are of equal contributory values, a general average sacrifice of ship takes place, and that in the foreign port where the general average is adjusted the amount of the ship's damage is estimated at 6,000*l.* The shipowner recovers 2,000*l.*, being one-third of this sum, from the cargo, Illustration

(*l*) The Brigella, [1893] P. 189; but with this decision cf. that of Mathew, J., in Montgomery *v.* Indemnity Mutual, &c. Co., [1901] 1 Q. B. 147.

Sect. 1003. and her repairs are subsequently completed at home for 4,500*l.* On the first alternative, the shipowner would recover 4,000*l.* more from his underwriters, receiving thus 6,000*l.* in all for damage which has only cost him 4,500*l.* On the second alternative, he would receive from his underwriters two-thirds of 4,500*l.*, making 5,000*l.* in all. On the third alternative, having already received 2,000*l.* from the cargo, he would only recover the balance of his loss, namely, 2,500*l.* There is obviously much to be said in favour of the third alternative, inasmuch as it is the only one under which the shipowner does not make a profit out of his loss. And if it be urged that there is no reason why the underwriter, rather than the shipowner, should enjoy all the benefit of the over-payment made by the cargo-owner, it must be remembered that in the converse case—*i.e.*, where the amount of the damage happens to have been under-estimated at the foreign port—it is the underwriters on ship who suffer all the loss in consequence of such under-estimate; for the shipowner can proceed against his own underwriters for the whole of his general average damage, surrendering to them merely the inadequate proportion which he has received from the cargo. If, then, under these circumstances it is they who suffer, it may be contended that when circumstances are different it is they who should have the advantage.

The attention of average adjusters seems not to have been so much turned to this possible view of the matter as to have been divided between the merits of the other two alternatives. An attempt has lately been made to agree upon a rule by which the second alternative would have become a rule of practice, but the discussion revealed so substantial a difference of opinion that the attempt proved a failure. Those who support the first alternative conceive that it is forced upon them by the decisions upon the Foreign Adjustment Clause which have been already noticed (*m*), and that the adoption

(*m*) *E.g.* Harris *v.* Scaramanga; Hick *v.* London Ass. Co.; The Mary Thomas, *ubi supra*, and Price *v.* The A1 Ships' Small Damage Assn. (1889), 22 Q. B. D. 580.

of any other rule would be in defiance of the law. The editors do not quite appreciate this difficulty. These cases do not appear to determine anything more than that what a foreign adjustment declares to be general average shall be general average, and that the aggregate of such adjustment shall be recoverable as such from English underwriters. They do not determine that a shipowner shall, under any circumstances, recover from his underwriters more than the loss he has sustained. Sect. 1003.

1004. The average having been thus adjusted, it remains to inquire who are the parties legally liable to pay the proportionate shares of the contribution, and in what mode can such payment be enforced. Liability of the owners of ship, goods and freight, for their respective amounts of contribution.

Primarily the sole parties liable by the law of general average are the parties upon whose respective interests the contribution has been assessed, *i.e.*, the owners of ship, freight and goods. But by virtue of the contract in the policy, the owner of goods sacrificed may have recourse in the first instance to the insurer for the whole of his loss, and the insurer upon payment succeeds, by subrogation, to the rights of the assured as against third persons (*n*). This rule, however, does not apply to general average expenditures, as these do not involve the loss or destruction of any part of any particular interest, so as to make the underwriter on that interest directly liable in respect of the whole thereof. Hence an underwriter cannot be sued for the whole of a general average expenditure, but only for the proportion assessed against the interest which he has insured, and there must therefore be some kind of adjustment before he can be so sued (*o*). Rights of parties liable against their underwriters.

The general practice now is for the underwriters to pay in the first instance the amount of their contribution; but this is a mere matter of convenient practical arrangement, leaving the legal liabilities, and therefore the legal remedies, of the respective parties entirely unaltered. Accordingly the master Modern practice—master's lien on the goods.

(*n*) Dickenson *v.* Jardine (1868), L. R. 3 C. P. 639.

(*o*) The Mary Thomas, [1894] P. 108.

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has still a lien on the goods till payment of the contribution (*p*), or he may enforce his claim by action (*q*).

Practice in case of a general ship.

In the case of a general ship, where there are many consignees, it is usual, in practice, for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average, when the same shall be adjusted (*r*). But the bond which is exacted in these circumstances must be reasonable. Nor is the shipowner bound to accept security in lieu of immediate payment; consequently each consignee must pay the amount demanded by the shipowner, or at his own risk tender what he thinks is his proper proportion. He is, however, entitled to the necessary account or particulars from the owner or master, to enable him to ascertain what his proper proportion is: and if such particulars be refused the consignee would not be allowed by the Court to be prejudiced by not having made a sufficient tender (*s*). A consignee who is not the owner of the goods is not rendered liable for contribution by the mere receipt of them under a bill of lading, unless there be an express condition to that effect in the bill (*t*).

The parties' interests are severally, and not jointly, liable.

The parties severally interested in ship, cargo, and freight, are, as a general principle, severally, and not jointly, liable for their respective proportions of the contribution: if, however, they be jointly interested, they would, on principle, be jointly liable, and have accordingly been held to be so in the United States (*u*).

Hence it also follows, that if one of such joint owners

(*p*) Per Lord Tenterden in Scaife *v.* Tobin (1832), 3 B. & Ad. 523. Cf. Anderson *v.* Ocean SS. Co. (1884), 10 App. Cas. at p. 115; and Huth *v.* Lamport (1885), 16 Q. B. D. 442, 735.

(*q*) Birkley *v.* Presgrave (1801), 1 East, 220.

(*r*) It is his duty to do so, and his owners will be liable to an action for damages at the suit of the cargo-owner if he neglects this duty. Crooks *v.* Allan (1879), 5 Q. B. D. 38; Strang *v.* Scott (1889), 14 App. Cas. 601; Nobel's Co. *v.* Rea (1897), 2 Com. Cas. 293.

(*s*) Huth *v.* Lamport (1885), 16 Q. B. D. 442, 735; The Norway (1864), Br. & Lush. 377, 397.

(*t*) Scaife *v.* Tobin (1832), 3 B. & Ad. 523; see Walford *v.* Galindez (1897), 2 Com. Cas. 137.

(*u*) Sims *v.* Willing (1822), 8 Serg. & Rawle, 103.

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have insured his interest separately, and in consequence of his joint liability is obliged to pay his partner's share of the contribution as well as his own, his underwriters will not be liable to reimburse to him their proportion of what he has so paid (*x*).

Direct liability of underwriters to reimburse general average sacrifice or contribution.

1005. Where there has been a general average sacrifice owing to a peril insured against, the underwriter is directly liable to the owner of the interest sacrificed in respect of the full amount of such sacrifice. Having paid in respect of the loss he is then entitled to stand in the place of his assured for the purpose of obtaining contribution from the other interests (*y*). The underwriter on the contributing interest is also liable, if the loss has been caused by a peril insured against, to reimburse his assured in respect of the contribution levied on the latter (*z*). The result is that questions of general average contribution are in practice frequently fought out not between the owners of the several interests, but by their respective underwriters. But, nevertheless, any question as to the right to contribution is always determined by the Courts without regard to any question of insurance, and as if the contest were in reality, as it is in form, one between the owners themselves (*a*).

Liability of underwriters proportionate to amount insured.

The underwriters are not necessarily bound to reimburse the full amount of the sacrifice or of the contribution, but only that proportion of it which the value of the interest as insured bears to its value as estimated for the purposes of contribution (*b*); and this is obviously just, for the value of the ship or

(*x*) See 2 Phillips, s. 1411.

(*y*) Dickenson *v.* Jardine (1868), L. R. 3 C. P. 639. In America the same rule is considered by Parsons as now established, although there is some authority the other way. See 2 Parsons, 289—293; Internat. Nav. Co. *v.* Atlantic Mut. Ins. Co. (1900), 100 F. 304. The rule does not apply to general average expenditures. The Mary Thomas, [1894] P. 108; *ante*, s. 1004.

(*z*) Boulay-Paty, Emerigon, vol. ii. p. 6.

(*a*) Cf. The Brigella, [1893] P. 189; but *contra*, Montgomery *v.* Indemnity Mutual Mar. Ins. Co., [1901] 1 Q. B. 147.

(*b*) Phillips, Ins. s. 1410; Anderson *v.* Ocean SS. Co. (1884), 10 App. Cas. 107; 54 L. J. Q. B. 192.

Sect. 1005. goods, as between the assured and his underwriter, is either their value in the policy or else, in an open policy, their value at the time and place of the ship's sailing; but their contributory value is, as we have seen, something very different to this, viz., their net value as they reach their owner's hands at the port of adjustment. It is evident, therefore, that the underwriter cannot be at all affected by the latter value, but only by the former (*c*).

Thus, suppose goods to be insured in the policy for 500*l.*; let their net value at the port of discharge, *i.e.*, their contributory value, be 1,500*l.*—the amount of contribution paid by them to be 150*l.*—then the underwriter will be liable to reimburse to the assured on goods, not 150*l.*, or the whole of the sum to be contributed, but 50*l.*, or a third of that sum, that being the proportion which the amount insured (500*l.*) bears to the contributory value (1,500*l.*); or to put the same thing in another way, the owner of the goods (as one of the parties to the contribution) has to pay in contribution 10 per cent. on their contributory value; but the underwriter has only to pay to the owner of the goods (as his assured) 10 per cent. on the amount for which they are insured.

Supposing the contributory value not to exceed the amount insured, the rule of reimbursement is still the same. Thus, goods insured for and valued in the policy at 500*l.* are valued in contribution at 500*l.* The assured has paid in contribution 50*l.*, *i.e.*, a tenth of the contributory value: the underwriter repays him 50*l.*, or a tenth of the value in the policy.

Hence the rule, "whatever is paid in contribution, by the excess of the contributory value over the value in the policy, is paid by the assured; but for whatever is paid on a contributory value not exceeding the value in the policy, the assured is indemnified on the proportion insured" (*d*).

(*c*) A convenient phrase obtains in practice for expressing these two values—viz., the contributory values and the arrived values; the latter alone concerning the underwriters.

(*d*) 1 Magens, 245, case xix.; Phillips, Ins. s. 1410. On the other hand, it is provided by a rule of the Association of Average Adjusters that an underwriter who has paid

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As against underwriters, contributory value cannot exceed the valuation in the policy.

1006. In a very recent case the facts were that a vessel was insured for and valued in the policy at 33,000*l.* During the currency of the policy she incurred general average expenses, and had also to pay a salvage award. In the salvage action her real value was proved to be 40,000*l.*, and this amount was also accepted as her contributory value for general average purposes. Her owners claimed to recover from their underwriters the whole amount of the ship's contribution towards the general average expenses and the salvage award. But it was held by Bigham, J., that they could not be allowed to allege that the value of the vessel exceeded 33,000*l.*, and that therefore only thirty-three fortieths of the whole amount was recoverable (*e*). A third alternative, which suggests itself to the minds of the editors, does not appear to have been argued in the case, namely, that the underwriters should be held liable for the amount which would have been assessed against the ship, if her contributory value had in fact been neither more nor less than her policy valuation.

The rule of the French law the same.

1007. So in France, it was decided in the Cour Royale of Aix (30th August, 1822), that, as between the assured and his underwriter a general average loss is to be adjusted, either upon the value in the policy, or, in an open policy, upon the value of the goods at the time and place of loading on board (*f*).

for loss by jettison of the thing insured is entitled, in the proportion that the sum insured bears to the policy value, to whatever is recovered in general average in respect of such loss, although the amount so recovered may exceed the amount paid by him. See Appendix E.

(*e*) The S.S. Balmoral Co. *v.* Marten, [1900] 2 Q. B. 748; under appeal. A similar point arose very recently in the United States District Court (Southern District of New York) in International Navigation Co. *v.* Atlantic Mutual Ins. Co. (1900), 100 F. 304, where Brown, D. J., in a very learned and exhaustive judgment, held the insurers liable for the full amount, irrespective of the valuations in the policies. His decision was lately affirmed on appeal. For a converse case, see The St. Johns (1900), 101 F. 469.

(*f*) Boulay-Paty, Emerigon, vol. ii. p. 8.

Sect. 1007. The following observations by Boulay-Paty tend to put the whole subject in a clear light:—

"When the object is to ascertain the nature and extent of the legal liabilities to which the underwriter is exposed in consequence of the contribution which has been assessed on the subject insured, reference must be had to the policy of insurance alone, which is the law really regulating the relations of the parties. The claim of the assured against his underwriter in respect of the contribution is a very different claim from that which he has against his co-adventurers, and flows solely from the stipulations in the policy. Hence, the adjustment as between the assured and the underwriter ought invariably to be fixed upon the value of the subject insured at the time and place of the ship's sailing, without any distinction in this respect between general and particular average loss" (*g*).

(*g*) Boulay-Paty, Emerigon, vol. ii. p. 8.

CHAPTER V.

OF PARTICULAR AVERAGE.

	SECT.
What is Particular Average?	1008, 1009
Adjustment of Particular Average—	
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1008. A PARTICULAR average loss is a loss arising from damage accidentally and proximately caused, by the perils insured against, to some particular interest, as the ship alone or the cargo alone (*a*). Definition of a particular average loss.

Expenses incurred for the purpose of preventing or mitigating a loss which would otherwise accrue or increase, and would fall accordingly upon the insurer, are not ordinarily regarded in this country as a particular average loss, but are called particular charges. As such, they are recoverable from the insurer under the sue and labour clause; and this is so, even where the policy contains a warranty against particular average, if they were incurred with the object of preventing not merely a partial, but a total loss (*b*). Distinct from particular charges.

Particular average, instead of being contributed for by the general body of those who are interested in the adventure, falls entirely upon the particular owner of the property Adjustment of particular average.

(*a*) "Particular average" is also used, however, to denote a partial, as distinguished from a "total loss," and not merely in contrast to general average. For a learned discussion by Mr. Maclachlan as to the origin, meaning, and history of the term "average" as used in the Maritime Law, see Arn. 6th ed. pp. 919—926. See also McArthur, Appendix 4.

(*b*) Kidston *v.* Empire Marine Ins. Co. (1866), L. R. 1 C. P. 535; (1867), 2 C. P. 357.

Sect. 1008. deteriorated by the damage (*c*); and such owner, if insured, has a claim against his underwriter in proportion, 1st, to the degree by which the damage sustained may have diminished the value to him of the property insured; 2nd, to the sum which the underwriter by the policy has agreed to insure on such property.

Whatever percentage this deterioration may amount to on the value which the property would otherwise have sold for, that same percentage the underwriter is bound to pay to the assured, upon the sum for which, by the policy, he has agreed to stand insurer.

For instance, if goods which have been insured for 500*l.*, would have realized in the market to which they were being sent 1,500*l.*, but for the occurrence of a particular average loss, which prevents them from selling there for more than 1,200*l.*, it is plain that these goods have been deteriorated to the extent of 300*l.*, or one-fifth of the value they would otherwise have realized: the underwriter, in such case, is not bound to repay the assured 300*l.*, or the whole amount of the actual loss sustained, but only 100*l.*, or a fifth part of the sum for which the goods were insured, that is, he is bound to pay the assured the same proportion of the sum insured, as the damage may have deducted from the value they would otherwise have realized.

What losses are particular average generally.

1009. As far as relates to the cause of loss, we have already investigated the principles and collected the examples of particular average losses, in treating of those risks and losses which are covered by the policy; on this part of the subject it will be only necessary to say, that all damage sustained at sea by ship and cargo which does not involve their total (*d*) destruction or privation, whether actual or constructive, gives the assured a claim against his underwriters, subject to the conditions and limitations by which the responsibility of the

(*c*) Hence the term "particular average loss." 1 Emerigon, c. xii. s. 39, p. 585.

(*d*) The distinction between a total loss of part, which is not within the warranty against particular average, and a partial loss of the whole, which is, is dealt with elsewhere, ss. 1018, 1082.

underwriter is modified and controlled. Of these conditions the principal are:—That the damage which is the subject of the claim must have been proximately caused by the perils insured against, and that it must not have arisen either from the ordinary wear and tear of the voyage, or from the inherent vice and defect of the subject insured, or the wilful misconduct of the assured himself. When the foundation of the claim against the underwriter consists in expenditures incurred in the course of the voyage (*e*), it must appear that these expenditures were—1, necessary; 2, extraordinary (that is, necessitated by some casualty, not by the mere common occurrences of an average voyage); 3, incurred for the benefit of the ship alone, or the cargo alone. Sect. 1009.

It would be merely to repeat what has been elsewhere stated, if we attempted in this place to enumerate all the cases that give a claim for particular average loss on the different subjects of insurance. We propose now to consider the principles and rules which govern the adjustment of any loss, when it has been ascertained to be a particular average loss.

Firstly, as to the adjustment of a particular average loss on goods.

1010. The true method of ascertaining the amount which the underwriter ought to pay, in order to indemnify the assured for a particular average loss on goods arriving sea-damaged, depends mainly upon the following elementary principle of insurance law; viz., that the amount upon which the premium is paid is, as between the assured and the underwriter, the sole amount to be regarded in estimating the amount of the underwriter's liability: he pays no loss upon that for which he receives no premium (*f*). Adjustment of particular average on goods.

(*e*) Generally styled "particular charges." Kidston *v.* Empire Marine Ins. Co. (1866), L. R. 1 C. P. 535.

(*f*) In order to avoid all misconception, let it be remembered that each separate underwriter pays only upon the actual sum by him subscribed. Thus, if five underwriters have each subscribed 200*l.* on a policy on goods valued at 1,000*l.* and the goods arrive damaged one-

Sect. 1010. Now, in a fully underwritten policy on goods, unless otherwise stipulated, this amount is either, in an open policy, their prime cost (*i.e.*, their invoice price at the port of loading), together with all expenses till put on board, including premium and costs of insurance (*g*), or else, in a valued policy, the value expressed in the policy; hence the sole basis upon which a particular average loss on goods fully insured can be adjusted is, as regards the underwriter, either their prime cost on board, or their value in the policy (*h*).

When the goods are only partially insured, it has already been pointed out that there is no difference in the amount recovered, in case of a particular average loss, whether the policy be valued or open. The amount recoverable depends in general, in both cases, on the amount subscribed (*i*).

Amount of loss payable by underwriter ought not to vary with the rise and fall of the markets at the port of arrival.

1011. From this principle it follows that the amount which the underwriter has to pay, in respect of a particular average loss on sea-damaged goods, cannot at all depend upon the higher or lower market price which such goods may fetch in their port of destination or arrival.

For this market price at the port of destination is a very different thing from their prime cost on board at the port of loading, or (it may be) from their value in the policy, being the price at which the merchant can afford to sell them there to a consumer, after paying freight and all charges, and either realising a profit or submitting to a loss; this price, therefore, is composed of three constituent parts—1. Prime cost on board; 2. Freight, duty, and landing charges; 3. Profit in a gaining, or loss in a losing, market (*k*).

fourth, each underwriter will have to pay 50*l.* as his quota to make good this loss—*i. e.*, one-fourth of 200*l.* The five underwriters will pay collectively 250*l.*, or one-fourth of 1,000*l.*, the whole amount of the valuation.

(*g*) Tuite *v.* Royal Exch. Ass. Co. (1747), 1 Park, 224, 225; Usher *v.* Noble (1810), 12 East, 639; Waldron *v.* Coombe (1810), 3 Taunt. 162.

(*h*) Usher *v.* Noble (1810), 12 East, 639; Tuite *v.* Royal Exch. Ass. Co. (1747), 1 Park, 224, 225; 1 Marshall, 232; Stevens, Av. 178; Benecke, Pr. of Indem. 12—14.

(*i*) See *ante*, chapter on "Valuation," s. 340.

(*k*) Benecke, Pr. of Indem. 3; Stevens, Av. 85.

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Now it is the first of these alone—*i.e.*, prime cost, or value in the policy—with which the underwriter on goods is concerned: he has not insured against loss by freight, &c.; he has not insured against loss of expected profit. In the language of Lord Mansfield, he only "engages so far as the prime cost or value in the policy, that the thing shall come safe; he has no concern with any profit or loss which may arise to the merchant from the goods; he has no concern with any subsequent value" (*l*).

Principle of indemnity in case of sea-damaged goods.

1012. The principle, in fact, of indemnity, as practically adopted in this country, is, as we have already seen, that the underwriter on goods does not engage to put the merchant in the same condition he would have been in, had his goods arrived safely at the port of destination, but solely to put him in regard to such goods in the situation in which he was at the beginning of the risk.

There is, therefore, an important distinction running through the whole of this branch of insurance law—viz., that the extent of loss the assured on goods sustains by the sea-damage is one thing, the amount which the underwriter has to pay in respect thereof is quite another; accordingly, when goods arrive sea-damaged, two points are to be ascertained—first, the extent of depreciation in value which the goods have suffered; secondly, the amount which the underwriter ought to pay in respect thereof.

Mode of ascertaining the extent of depreciation on goods arriving sea-damaged.

1013. The first point is ascertained by simply comparing the price for which the goods would have sold in the market had they arrived there sound, with the price for which they actually do sell arriving there damaged.

Sound and damaged values.

Where the damaged goods are actually sold by public auction, the amount they realise is called the damaged value; the value which they would have sold for, if sound, is estimated by supposing them to be sold at the current price for sound articles of the same kind in the same market, and the

(*l*) Lewis *v.* Rucker (1761), 2 Burr. 1170; Stevens, Av. 119.

Sect. 1013. amount supposed to be realised by these *pro formâ* sales is called the sound values.

The difference, then, between the market price of the sound and the market price of the damaged goods, or, in technical language, between the sound and damaged values, gives the direct amount of the merchant's loss.

But this cannot be the amount the underwriter has to pay, for, first, it would make the market price of the goods at the port of destination the basis of the underwriter's liability, when, as we have just seen, the only true basis of such liability is their prime cost at the port of loading; secondly, it would involve the underwriter in the rise and fall of the markets, with which, as we have also seen, he has no concern; that is, for the same amount of sea-damage he would have to pay more when the goods come to a gaining, and less when they come to a losing, market (*m*); while the desideratum is to obtain some uniform measure, or standard of value, by which the amount the underwriter has to pay, in respect of a particular loss on damaged goods, shall be always the same when the proportional extent of damage is the same (*n*).

(*m*) This will be obvious from the following example:—

Let the prime cost of the goods be 500*l.*; the amount of loss by sea-damage be half the sum for which they would have sold if sound; the profit or loss be half the prime cost.

Then take,

(1) A losing market.

Goods, if sound, would have sold for half prime cost	£250
Being damaged, did sell for half that sum.....	125
Difference between sound and damaged values (merchant's loss)	£125

The underwriter on a losing market would, on this principle, pay 125*l.*

Take next,

(2) A gaining market.

Goods, if sound, would have sold 50 per cent. above prime cost	£750
Being damaged, did sell for half that sum.....	375
Difference between sound and damaged values (merchant's loss)	£375

The underwriter on a gaining market would pay 375*l.*, though the amount of deterioration is the same in both cases,

(*n*) Stevens, Av. 119.

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Mode in which the ascertained percentage, or proportion of depreciation, is applied to the sum insured, in order to ascertain what the underwriter has to pay.

1014. The object, then, in comparing the proceeds of the sound and damaged sales for the purposes of indemnity under the policy, is not to ascertain the direct amount of the merchant's loss, but its relative amount—the proportion, that is, which it bears to the price at which the goods would have sold if sound; the question being, not whether the depreciation amounts to any given fixed sum, but whether it amounts to one-half, one-fourth, or one-eighth of the sum for which the goods would have sold if sound; whether, in a word, the commodity is one-half, one-fourth, or one-eighth the worse for the sea-damage; when this is ascertained, the liability of the underwriter is ascertained also, for he pays the same proportional part, whether it be one-half, one-fourth, or one-eighth of the prime cost, or value in the policy.

"The difference between the sound and damaged sales affords the proportion of loss in any given case, *i.e.*, it gives the aliquot part of the original value which may be considered as destroyed by the perils insured against; when this is ascertained, it only remains to apply this liquidated proportion of the loss to the standard by which the value is calculated, and you then get the one-half, the one-fourth, or the one-eighth of the loss in terms of money" (*o*).

Thus the sum which the underwriter will have to pay will depend solely on the relative extent of the loss, and will be the same whether the goods arrive at a gaining or a losing market (*p*).

(*o*) Per Lord Ellenborough in Usher *v.* Noble (1810), 12 East, 647.

(*p*) Take the same data as in the preceding note—*i. e.*, let the prime cost be 500*l.*; the depreciation, half the sound values; the profit or loss, half the prime cost.

Then,

(1) On a losing market.

Sound values (there being 50 per cent. loss on prime cost)	£250
Produce of damaged goods (being half the sound value)	125
Difference between sound values and damaged goods (*i. e.*, merchant's loss)	£125

But 125*l.* is one-half, or 50 per cent. on 250*l.* (the sound values); the

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In short, that which the assured loses by the depreciation of his goods is an aliquot part of the market value for which they would have sold, had they arrived sound at their port of destination; that which the underwriter pays in respect of such loss is the same aliquot part of their prime cost or value in the policy: thus, if the damage amounts to half the sound value of the goods, the underwriter pays half the sum he has agreed to insure; if to a third, then he pays a third of that sum, and so on in exact proportion to the extent of the depreciation (*q*).

The comparison must be of gross, not net, values.

1015. Even after this rule of adjustment was established, it was for some time doubted whether the amount of depreciation on the sea-damaged goods was to be ascertained by comparing together the net or the gross produce of the sound and damaged sales: the question came on for consideration in the Court of King's Bench, when it was established by Lawrence, J., in one of the ablest judgments ever delivered in Westminster Hall, that the true rule of adjustment is, that the percentage, or aliquot part, which the underwriter has to pay of the prime cost or value in the policy, must be ascertained by comparing the gross produce of the sound with the gross produce of the damaged sales (*r*); and this is now invariably acted on in practice as the true rule of adjustment (*s*).

underwriter pays one-half, or 50 per cent. on 500*l.* (the prime cost)—*i. e.*, he pays 250*l.*

(2) On a gaining market.

Sound values (being 50 per cent. over prime cost)	£750
Produce of damaged goods (being half the sound values)	375
Difference between sound values and damaged goods (merchant's loss) .	£375

But 375*l.* is one-half, or 50 per cent. on 750*l.* (the sound values); the underwriter pays one-half, or 50 per cent. on 500*l.* (the prime cost)—*i. e.*, he pays 250*l.*, as before.

(*q*) Lewis *v.* Rucker (1761), 2 Burr. 1167; Hurry *v.* Royal Exch. Ass. Co. (1801), 3 B. & P. 308; Johnson *v.* Shedden (1802), 2 East, 581; Usher *v.* Noble (1810), 12 East, 639.

(*r*) Johnson *v.* Shedden (1802), 2 East, 581, generally known at Lloyd's as the "Brimstone Case," from the nature of the subject insured, which was a cargo of brimstone and shumack. Stevens, Av. 92.

(*s*) Except where the policy con-

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It is in this way alone, as the learned Judge most ably shows, that an uniform measure or standard of adjustment can be obtained, the result of which will be the same whether the markets rise or fall, or whether the charges are increased or diminished (*t*).

By the gross produce of the sales is meant the market price at which the merchant, after paying freight, duty, and landing charges, can sell the goods to the consumer or purchaser at the port of arrival. It is plain that a comparison of the full market price, which the consumer would thus give for the damaged goods, with that which he would have given for the same goods if sound, all charges being in both cases previously paid by the seller, affords the exact measure of their depreciation; for it is the deteriorated quality of the goods which, in such case, alone determines the difference of price; "the quality of the goods," as Lawrence, J., puts it, "can alone influence him in determining what he shall pay" (*u*).

Otherwise the underwriter would be involved in the rise and fall of the markets.

1016. This mode, then, gives the exact measure of depreciation; it is clear, also, that the comparison of the net proceeds would not only fail in this respect, but would also involve the underwriter in the rise and fall of the markets; by the term "net proceeds" is meant the gross proceeds, deducting freight, duty, and landing charges. Now, with regard to freight, the most important of these deductions, it is a fixed principle of our law maritime that however much goods may be deteriorated in value by sea-damage, yet, if they arrive in bulk, the same freight is payable on them as though they had arrived sound. The deduction then to be made from the gross proceeds of the sound and damaged sales in respect of freight would be an invariable quantity, however great the

The same freight is payable on goods arriving in bulk, however damaged.

tains a special clause as to adjustment on the basis of bonded prices or net proceeds.

(*t*) For detailed proof, see Stevens, Av. 119.

(*u*) 2 East, 583. Where damaged goods have prior to sale been necessarily conditioned, it is the value of the conditioned goods, and not that of the goods less the cost of conditioning, that is to be compared with the sound value, in order to ascertain the proportion of loss. Francis *v.* Boulton (1895), 65 L. J. Q. B. 153 (Mathew, J.).

Sect. 1016. amount of damage might be, and whether the goods came to a losing or a gaining market; but, as Lawrence, J., says, in the celebrated judgment already referred to, "If you take equal quantities from two unequal quantities, the smaller such unequal quantities are, the greater will be the difference between their remainders." Now, as the percentage on the prime cost or value in the policy, payable by the underwriter, varies directly with the amount of this difference, it is obvious that any method of adjustment which makes such amount greater or less, according to the rise or fall of the markets, must involve the underwriter in the consequences of such rise and fall. The method of adjustment by comparison of the net proceeds of the sound and damaged sales inevitably leads to this result, and therefore, upon the principles already stated, is rejected (*x*). Another consequence of taking the

(*x*) Take the same data as in the two preceding notes, and let the amount of freight payable on the goods be in all cases 100*l.*

Then,

(1) On a losing market.

Gross sound sales	£350	
Deduct freight and charges	100	
Net sound sales		£250
Gross damaged sales (half less)	£175	
Deduct freight and charges	100	
Net damaged sales		75
Difference (giving the amount of damage)		£175

But 175*l.* is 70 per cent. on 250*l.* (the net sound sales) ∴ the underwriter pays 70 per cent. on 500*l.*, the prime cost—*i. e.*, 350*l.*

(2) On a gaining market.

Gross sound sales	£850	
Deduct freight and charges	100	
Net sound sales		£750
Gross damaged sales (half less)	£425	
Deduct freight	100	
Net damaged sales		325
Difference (giving the amount of damage)		£425

But 425*l.* is 56⅔ per cent. on 750*l.* (the net sound sales) ∴ the underwriter pays 56⅔ per cent. on 500*l.* (the prime cost)—*i. e.*, 283*l.* : 6*s.* 8*d.* That is, for the same amount of damage the underwriter pays 350*l.* in a losing, and 283*l.* : 6*s.* 8*d.* in a gaining market.

net produce would be, that the underwriter would be made responsible for a loss not arising from the deterioration of the commodity by sea-damage, but from having to pay equal freight duties and charges on commodities of unequal value, viz., on the sound and damaged goods. Sect. 1016.

But, by an adjustment founded on a comparison of the gross proceeds of the sound and damaged sales, the extent of the underwriter's liability will be always the same, when the relative amount of depreciation is the same. Thus, let it be assumed that the gross proceeds of goods valued at 500*l.* in the policy would, if they had come to a losing market in a sound state, have been 350*l.*, and if to a gaining market, 850*l.*; let it be further assumed that the depreciation in both cases is one-half their sound value:—

	In a losing market.	In a gaining market.
Then, gross proceeds of sound sales .	£350	£850
gross proceeds of damaged sales	175	425
Difference, giving amount of damage .	£175	£425

In both these cases, the amount of damage being half the gross proceeds of the sound sales, the underwriter pays half the value in the policy, or 250*l.* in each case, irrespective entirely of all fluctuation in the markets.

1017. An exception to the rule of adjustment by which the amount of depreciation of damaged cargo is made to depend on a comparison betweeen the gross sound and gross damaged values is allowed in practice, in the case of goods which are at the port of destination ordinarily sold in bond. Apart from such exception, the rule above laid down would require the duty to be added to the sound and arrived, or damaged, values, before the comparison was made. But there was for years a custom at Lloyd's "to adjust particular average on a comparison of bonded, instead of duty-paid, prices, in claims for damage to tea, tobacco, coffee, wines and spirits imported into this country." The principle on which this exception Exception where custom to sell in bond.

Sect. 1017. was based has in more recent times received a wider recognition by the adoption of the following rule by the Association of Average Adjusters:—"That in consequence of the facilities generally offered to bond goods at their destination, on which terms they are often sold, the term 'gross proceeds' shall, for the purposes of adjustment, be taken to mean the price at which the goods are sold to the consumer, after payment of freight and landing charges, but exclusive of customs duty, in cases where it is the custom of the port to sell or deal with the goods in bond" (*y*).

Adjustment on a total loss of part.

1018. When an integral part of the goods insured is totally lost, as, *e.g.*, where one case or package out of several cases or packages of the same description of goods is burnt, or has all its contents washed clean out of it, or goes in bulk to the bottom of the sea, the underwriters will have to pay the same proportion of the value in the policy, which the goods lost bear to the whole goods of the same description comprised in the valuation; in other words, the exact amount lost must be paid for at its value in the policy (*z*).

Where there is also a particular average loss of part.

When such total loss of part and also a particular average loss both occur on the same interest, as, for instance, if of twenty hogsheads of sugar ten be totally washed out, and ten damaged by sea water, the practice is to adjust them separately; but this is not absolutely necessary, as, whether they are involved together or separated, the result is precisely the same (*a*).

Adjustment where, of several different articles insured together, each arrives sea-damaged.

But where several articles are insured together in the same policy, and each suffers a particular average loss by sea-damage, the loss must be adjusted separately on each, even though the clause "to pay average on each species as

(*y*) See McArthur, 252. Where the amount of the duty is not an invariable charge, but varies with the amount of the damage, it is immaterial whether the adjustment of a particular average loss on damaged goods sold in bond be made on a comparison of the amount of the sales either including or excluding the duty. See Stevens, 137—147; Benecke, 430.

(*z*) Stevens, Av. 150; Benecke, Pr. of Indem. 150.

(*a*) Benecke, Pr. of Indem. 439; Stevens, Av. 151, 152, who give the proof.

if separately insured" be not inserted in the policy: for otherwise the underwriter would be involved in the rise and fall of the markets, except in the very improbable case when the state of the markets at the port of arrival is alike as to all the articles, *i.e.*, when all the articles, had they arrived sound, would have realized in the port of arrival exactly the same percentage of profit and loss upon their first cost, or valuation in the policy (*b*). Sect. 1018.

When out of whole packages or bales of manufactured goods only a few articles or pieces in each arrive sea-damaged, it is a frequent practice to sell the sound and damaged goods together at the same auction: the practice does not appear objectionable; but it must be carefully borne in mind, that in adjusting the average on such a sale the diminished value at which the sound part of the package may sell, owing to the assortment being broken, is not a loss for which the underwriter is liable: for, as Stevens observes, "he is accountable only for the actual damage done to the thing insured, and engages to guarantee the assured against the direct operation of sea-damage, but not against the consequential results" (*c*). Sale of sound and damaged goods together when forming part of same bale or package. Underwriter not liable for loss owing to the assortment being broken.

In practice, where a bale or case containing a number of smaller pieces or packages appears to be substantially damaged, the bale or case as a whole is sold as damaged goods, and the underwriter is charged with his proper proportion of the difference between the sound and damaged values of the whole, without any investigation as to the exact amount of physical damage which the goods may have actually sustained.

1019. As, however, sales by auction of the damaged goods Extra charges of damaged

(*b*) This is most ingeniously and incontestably proved both by Benecke and by Stevens; by the former algebraically, and by the latter arithmetically; the proof, however, in its detail, is too long for insertion here, and the reader is, therefore, referred to Benecke, 441, n. ‡, and Stevens, 153—155.

(*c*) Stevens, 155—158, 5th ed.; Benecke, 437, 438. See accordingly Cator *v.* Gt. Western Ins. Co. of New York (1873), L. R. 8 C. P. 552; Lysaght *v.* Coleman, [1895] 1 Q. B. 49 (C. A.).

Sect. 1019. sales to be added to the loss payable by the underwriter.

are resorted to mainly with the view of comparing the sound and damaged values, so as to ascertain the amount of indemnity which the underwriter has to pay; and, as the charges of these sales need not have been incurred if the goods had not been insured, they are to be borne by the underwriter, though not a part, nor a direct consequence, of the sea-damage: accordingly, these extra charges (consisting mainly of brokerage, lot money, commission to the agent of the underwriters, &c.) are added separately to the amount of the loss, after its quantum has been ascertained, and then the whole is apportioned on the underwriters in the usual way (*d*). Where, in an action on a policy, the jury had found a verdict for an average loss, the Court would not grant a new trial, on the ground that it should have been left to the jury to determine whether these extra charges of the damaged sales should be borne by the underwriter or not; as that point was in the discretion of the arbitrator by whom the amount of the loss was directed to be ascertained (*e*).

It should here be noticed that though the charges for ascertaining the damage to goods fall upon the party who is liable to bear the damage thereon, *i.e.*, upon the underwriter when he is liable under the policy (*f*), yet the underwriter cannot be made liable for the cost of examining such goods as prove to be undamaged (*g*).

Sea-damage on goods sold in ship's port of distress adjusted as a salvage loss.

1020. Generally speaking, a particular average loss on goods is adjusted at the port of destination, and, in such case, the adjustment ought always to be conducted in the manner above described: if, however, a ship, in the course of her voyage, is obliged to run for a port of distress to repair, and

(*d*) Stevens, Av. 148—150; Benecke, 436, 437. The rule of practice adopted by the Association of Average Adjusters is that "the expenses of protest, survey and other proofs of loss, including the commission or other expenses of a sale by auction, are not admitted to make up the percentage of a claim; and are only paid by the underwriters in case the loss amounts to a claim without them."

(*e*) Hudson *v.* Marjoribanks (1823), 7 Moore, 463; *S. C.* but not *S. P.*, 1 Bing. 393.

(*f*) 2 Phillips, Ins. s. 1741.

(*g*) Lysaght *v.* Coleman, [1895] 1 Q. B. 49 (C. A.).

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the cargo being necessarily unloaded for that purpose, it is discovered that the whole, or part of it, is so damaged that it would probably be wholly spoiled if reloaded and sent on, and therefore, to prevent further deterioration, it is sold on the spot for the benefit of all concerned, in such case the claim must be adjusted as a salvage loss—that is, the underwriter pays the difference between the prime cost, or insured value of the goods, and the net proceeds of the damaged sales, *i.e.*, their market price after deducting all expenses, including freight, where any is due (*h*).

Adjustment on goods at an intermediate port.

If the assured, in order to take the benefit of a favourable market, or for other reasons, chooses to put an end to the risk by voluntarily receiving his goods at any port short of their destination, Phillips thinks that the loss the goods may have incurred by sea-damage should be adjusted upon the same principles as at the port of destination (*i*).

Adjustment on goods arriving sea-damaged above 5 per cent. under the memorandum.

1021. In treating of the common memorandum, we have already had occasion to consider the mode of computing the degree of loss by sea-damage on memorandum articles, so as to ascertain whether it amounts to 5 per cent.; it is perhaps hardly necessary to add that, in order to make the underwriter liable under this clause, it is not necessary that the direct loss sustained by the merchant should amount to 5 per cent. on the prime cost or the sum insured, but only on the gross proceeds of the sound sales (*k*).

Adjustment where whole of intended

Generally speaking, as we have seen in case of sea-damage to goods under a valued policy, the valuation is the sole basis

(*h*) Stevens, 81; Appendix ii. 263—265; Benecke, 444; 2 Phillips, s. 1480.

(*i*) 2 Phillips, Ins. s. 1467.

(*k*) Phillips puts this case: Several articles are included in one invoice, all insured "free of average under 5 per cent." without discrimination of the different articles. How is the 5 per cent. to be computed? Suppose one of the articles to be sea-damaged —are the underwriters liable if the damage to this article is 5 per cent. of the sound value of all the articles, or are they only liable where it is 5 per cent. on the whole invoice value of all the articles? He decides, and, as it seems, with reason, that the latter is the true mode of computation: 2 Phillips, s. 1782. *Secus*, if the policy is to be construed distributively, as in Duff *v.* Mackenzie (1857), 3 C. B. (N. S.) 16, and Wilkinson *v.* Hyde (1857), 3 *id.* 30.

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cargo not on board at time of loss.

of adjustment, *i.e.*, the underwriters are to pay the same percentage on the valuation in the policy as the rate of depreciation amounts to on the sound sales; and this is so whenever, at the time of loss, the full cargo was on board to which the valuation was intended to apply. Where, however, only a part of the full intended cargo is on board at the time of loss, and such part is totally lost with the ship, the rule of adjustment on valued policies is that the underwriters pay the same proportion of the valuation in the policy as the goods lost bear to the whole intended cargo (*l*); in open policies they pay the proved value of the goods (*m*). The rule would be the same, *mutatis mutandis*, if such part, after being shipped, arrived sea-damaged.

Adjustment on a policy covering a fluctuating interest.

The following case shows the rule of adjustment on a policy intended to cover a fluctuating interest:—An insurance was effected for twelve months "on goods" on board thirty barges plying backwards and forwards between London and Birmingham for 12,000*l.*, "as interest might appear thereafter." A particular average loss having been sustained by the sinking of one of these barges full of goods within the year, it was held that the underwriters were bound to pay that proportion of such loss, as 12,000*l.* bore to the whole value of goods at risk on board all the barges at the time of loss, and not that proportion which 12,000*l.* might bear to the whole amount carried during the year (*n*).

Merchant does not get a real indemnity under an open policy.

1022. While the underwriter on goods (as is now the invariable practice) insures only their prime cost at the port of loading, the sole mode of adjustment that can be adopted is that which is founded on a comparison of the gross proceeds of the sound and damaged sales. But although, as between

(*l*) Tobin *v.* Harford (1863), 13 C. B. (N. S.) 791; 32 L. J. C. P. 135; in error, 34 L. J. C. P. 37.

(*m*) Rickman *v.* Carstairs (1833), 5 B. & Ad. 651.

(*n*) Crowley *v.* Cohen (1832), 3 B. & Ad. 478. The decision, however, seems to turn rather on the construction of the particular policy than on any rule of adjustment, the policy being held to be not so much a floating policy on goods up to 12,000*l.* as a time policy covering all goods at risk at any one moment.

the assured and the underwriter, this is an equitable mode of adjustment, it is obvious that it by no means affords a perfect indemnity to the assured as a mercantile man. Indeed, as we have already seen, it does not profess to do so—its object being not to put the assured in the same condition as though his goods had come undamaged to a saving market, but solely to place him in the same condition he was in at the beginning of the risk (*o*). Sect. 1022.

That which the assured loses by the depreciation of his goods at the port of destination is an aliquot part of their market price there, which market price is made up—1, of their prime cost; 2, of freight, duty, and landing charges; 3, profit or loss. That which the underwriter pays is the same aliquot part of the prime cost alone; hence it is manifest that all loss incurred by items 2 and 3 must fall on the assured alone.

In an earlier part of this work, while dealing with the subject of valuation, we have noticed certain methods which have been suggested for the purpose of securing a more complete indemnity to the assured. To those pages the reader is here referred (*p*).

1023. Having seen elsewhere for what partial losses and disbursements the underwriter on ship is liable under the policy, it remains now only to consider in what mode such losses are adjusted. Adjustment of particular average on ship.

In ordinary cases a vessel which has been damaged is repaired by her owners. A vessel is generally intended to be navigated, and a damaged vessel is unfit for navigation. The usual measure of the damage sustained by the ship-owner is the cost of repairing minus the improvement resulting therefrom (*q*). No such comparison between repaired and unrepaired value is resorted to in the case of ship, as we have just seen is usually made in the case of particular

(*o*) Stevens, Av. 96; Benecke, Pr. of Indem. 1—23.

(*p*) Vol. I. ss. 337, 344.

(*q*) Lowndes on Mar. Ins. 2nd ed. p. 190.

Sect. 1023. average on goods. The reason why a different method of adjustment is usually applied in the two cases is that goods are usually intended for sale, and though damaged will nevertheless command a price. If they require to be reconditioned, this is generally done, not by the merchant assured, but by the purchaser. A ship, however, is not usually intended for sale, and it is presumed that necessary repairs will be done by her owner (*r*).

Rule of adjustment.

The rule for adjusting a particular average loss on the ship is very simple, viz., that in open policies the underwriter pays the same aliquot part of the sum he has agreed to insure, as the damage or the expense of repairing it is of the ship's value at the commencement of the risk; in valued policies he pays the same proportion of the repair bill as his subscription bears to the valuation in the policy (*s*). Thus, suppose in an open policy an underwriter has insured 1,000*l.* on a ship, the insurable worth of which is proved to have been 2,000*l.* at the outset of the risk, but whose value is reduced by the wear and tear of the voyage, &c., to only 1,500*l.* at the time of loss; then if a particular average loss takes place amounting to 500*l.*, as that sum is one-fourth of 2,000*l.*, the ship's insurable value at the outset, the underwriter pays the same proportionable amount, or one-fourth of 1,000*l.* the sum he has insured, viz., 250*l.* (*t*).

The principal difficulty, therefore, in adjusting a particular

(*r*) The distinction is well pointed out by Luah, J., in Lohre *v.* Aitchison (1877), 2 Q. B. D. at p. 507; see also per Lord Blackburn, 4 App. Cas. at p. 762; per Brown, D. J., in Internat. Nav. Co. *v.* Atlantic Ins. Co. (1900), 100 F. at p. 323. Where goods are in fact reconditioned by the assured, the same rule applies as if the case were one of particular average on ship, see Francis *v.* Boulton (1895), 65 L. J. Q. B. 153. And, conversely, as to the method adopted where the damaged ship was sold, see Pitman *v.* Univ. Mar. Ins. Co. (1882), 9 Q. B. D. 192; *post*, s. 1034.

(*s*) Benecke, Pr. of Indem. 460; 2 Phillips, Ins. s. 1435. As to the effect of different valuations in two or more policies, cf. Bruce *v.* Jones (1863), 1 H. & C. 769; Bousfield *v.* Barnes (1815), 4 Camp. 228; *ante*, ss. 349—353.

(*t*) This shows the policy of insuring ships, as nearly as may be, to their full value, for the purposes of indemnity.

average loss on ship consists not in the rule of apportionment, but in ascertaining and fixing the amount of damage. Sect. 1023.

Rule of deducting one-third new for old.

1024. If the damage done to the ship has not been repaired, the only mode of ascertaining its amount is by the estimate of surveyors. Where, however, the damage has been repaired, the established mode of estimating its amount is to deduct one-third from the whole expense both of labour and materials which the repairs have cost, and to assess the damage at the remaining two-thirds. This is termed deducting one-third new for old, and it is done on the principle that, unless where the ship is quite new, the substitution of new for old materials is a benefit to the shipowner, who gets the ship the better for the repairs by the substitution of new work for old, and would consequently be a gainer if the whole expense of labour and repairs were regarded as so much pure loss to him; to avoid discussion in each particular case the amount of deduction is fixed at one-third (*u*).

Limitations of the rule as to deducting one-third new for old.

This rule, as regards wooden ships, is confirmed by the decisions above referred to. There is no decision of the Courts as to its applicability to iron ships (*x*), and it is doubtful how far it would be held binding. The usage, however, is to apply the rule in general to both; but, as regards iron ships and ironwork in wooden ships, with certain exceptions which are now formally recognized by the Association of Average Adjusters (*y*). Moreover, in practice the rule is often superseded by special clauses in the policy, such as—"In event of claim, no one-third new for old to be deducted from the cost of ironwork repairs of hull, masts or spars;" or, where it is intended that there shall be no such deduction at all, "Average payable without deduction of thirds, new for old, whether the average be particular or general."

(*u*) Da Costa *v.* Newenham (1788), 2 T. R. 407; Poingdestre *v.* Royal Exch. Ass. Co. (1826), Ryan & Moody, 378. Per Lord Tenterden in Fenwick *v.* Robinson (1828), 3 C. & P. 324; Lohre *v.* Aitchison (1877), 2 Q. B. D. 501; 3 Q. B. D. 558; Stevens, Av. 172; Benecke, Pr. of Indem. 457.

(*x*) As to this, cf. Lidgett *v.* Secretan (1870), L. R. 6 C. P. at p. 627 (per Willes, J.).

(*y*) See rule in Appendix E.

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Henderson v. Shankland criticised.

1025. In Henderson v. Shankland (s) the "Woodburn" sustained particular average damage, which was followed by general average sacrifices, making her a constructive total loss, and for the purpose of contribution it was determined that the value of the ship was her value after suffering the particular average damage, and before the general average sacrifices. It was further held that this value could be properly arrived at by estimating what would have been the cost of doing the particular average repairs, and deducting this amount from her sound value before the accident. The owners of the vessel then contended that from the estimated cost of such repairs there should be a deduction of one-third new for old. And it is submitted that this contention was well-founded. For a damaged vessel is not depreciated in value to the extent of the whole cost of the repairs which are necessary to reinstate her, but only to the extent of the difference between such total cost and any enhancement in value which she may acquire by reason of having new materials put into her; and this extent custom has fixed at two-thirds of the cost of the repairs. For instance, suppose the sound value of the vessel to have been 1,200*l.*, and the cost of repairing the particular average damage 300*l.*, it does not follow that before the repairs were effected she was only worth 900*l.*, because it is presumed that her value after the repairs is enhanced to the extent of one-third of the repairer's bill. The Court of Appeal, however, affirming Mathew, J., refused to apply the one-third rule to this case, relying mainly on the opinion expressed in this work, and also of Phillips, that the deduction is not applicable to cases of constructive total loss, where the inquiry is whether the cost of the necessary repairs will exceed a vessel's repaired value. But this opinion appears to the present editors to be quite consistent with the application of the thirds principle in the case under consideration. The reason why the deduction is not allowed in cases of constructive total loss is simply because

(s) [1896] 1 Q. B. 525.

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the sole question for consideration there is whether the vessel is worth repairing or not, and her value before the damage is immaterial. In order to determine whether the vessel is worth repairing, the actual cost of the repairs must clearly be considered without deductions. If a vessel can only be repaired at a cost of 3,000*l.*, and she will then not be worth the 3,000*l.* spent on her, there is clearly a constructive total loss. It would be absurd to require the owner to spend the 3,000*l.* in all cases where the vessel after such expenditure will be worth over 2,000*l.* These considerations, however, do not apply to the case of the deductions which were claimed in Henderson *v.* Shankland.

The deduction is not made where the ship is on her first voyage.

1026. It is obvious, that if the ship be quite new, the reason for the rule would fail, and the rule itself consequently would not apply; accordingly, if it can be shown that this is the case, the deduction of one-third new for old will not be made (*a*). In this country the general rule is that a ship is to be so regarded only while she is on her first voyage (*b*); but when she shall be considered to be on her first voyage is in itself a question that has given rise to much controversy, and can hardly yet, perhaps, be considered as settled, as the following cases will show. A ship, which had never been at sea before, was insured on a voyage "from Bristol to New York, during her stay there, and back to the port of discharge;" the charter-party stipulated that the ship, after sailing outwards, was "to return to London, Liverpool or Bristol, &c., and so end her intended voyage." The ship arrived at New York in safety, but, on her passage homeward from New York to Liverpool, got upon a shoal, and was obliged to be repaired; upon a claim for these repairs the sole question was whether the ship was on her first voyage or on her second when the loss took place, so as to be within the rule for deducting one-third new for old—in other words,

What is the ship's first voyage.

Fenwick *v.* Robinson.

(*a*) Stevens, Av. 172.

(*b*) The York-Antwerp Rules, 1890, allow no such deductions in the case of wooden or composite ships when the vessel is under one year old at the time of the accident.

Sect. 1026. the question was whether the passage back from New York to England was under the circumstances to be considered as a second voyage or only as part of the first.

After much conflicting evidence of brokers and underwriters, Lord Tenterden suggested to the jury that the charter-party and policy might fairly be taken into consideration for the sake of ascertaining whether the voyage out and home was all one adventure, as, upon the face of those instruments, his Lordship said, it appeared to be. The jury found for the plaintiff, saying that they considered it as all one voyage (*c*).

Pirie *v.* Steele.

1027. In the next case a new ship was chartered for a voyage from London to Port Jackson and Van Diemen's Land with convicts, freight to be paid on her arrival there; and by the ship's articles it appeared that she was bound on a voyage from England to Van Diemen's Land, Australia, or any other (*sic*) port in India, till her arrival in England. The ship completed her outward voyage, but being unable to procure homeward freight from Van Diemen's Land, went in ballast to Madras, and there took in freight for England, as was proved to be customary for ships so chartered. In the homeward passage from Madras to England she sustained injury whereby the same question was raised.

The evidence, as in the former action, was very contradictory; but the jury expressed themselves satisfied that the rule allowing a deduction of one-third did not apply under the circumstances, and found for the plaintiff (*d*).

Lord Abinger considered that the most sensible rule was, not to deduct thirds until the ship was of a certain age.

Lord Abinger, before whom the case was tried, said that he could not subscribe to the doctrine of the policy determining the point (*e*), and at the same time approved of the practice of some insurance companies to deduct no thirds unless the ship be eighteen months old as a very sensible

(*c*) Fenwick *v.* Robinson (1828), Danson & Lloyd, 8; *S. C.*, 3 C. & P. 323.

(*d*) Pirie *v.* Steele (1837), 2 Mood. & Rob. 49; *S. C.* (more fully reported), 8 C. & P. 200.

(*e*) 8 C. & P. 204.

rule (*f*). Special clauses to this effect are commonly inserted in modern policies. Sect. 1027.

These decisions are not satisfactory, nor is it, perhaps, possible to derive from them any general rule—though, upon the whole, the weight of authority seems in favour of the position that, except under very special circumstances, a new ship is to be considered on her first voyage, so as to exclude the underwriter from deducting thirds, if the loss takes place at any part of an integral voyage out and home, whether on the outward or homeward passage, the entirety of the voyage to be determined from all the facts of the case, and not from the charter-party or policy alone. In fact, as it was put by Sir Frederick Pollock, in the course of his argument in Pirie *v.* Steele, the first voyage lasts from the first time that a ship leaves her port till she comes back to it again, if she leaves it *cum animo revertendi* (*g*). Remarks on these decisions. Suggested rule.

1028. If an old ship have been newly repaired just before sailing on the voyage on which the loss takes place, and the loss falls exclusively on the new materials, the same rule of exclusion of thirds would seem to apply (*h*); but this is a case which can rarely, if ever, occur; and it has been decided that if the damage only fall chiefly on the repaired part, there is nothing to exclude the underwriter from his right of deducting thirds (*i*). Where loss is chiefly on new material of an old ship.

If the ship, after being repaired, never comes into the hands of the owner again, the reason for the rule obviously fails, as in such case it is clear that he can never derive any benefit from the superior value of the new over the old materials. Where ship never comes to the hands of the owner again.

(*f*) 8 C. & P. 202. Cf. also Thompson *v.* Hunter, cited 2 Mood. & Rob. 51, where it is stated that "the plaintiff recovered the full amount of his loss," which must clearly be erroneous, and must mean "the amount minus deduction of one-third new for old."

(*g*) 8 C. & P. 201. In the United States this exception of the "first voyage" appears in general not to be recognized; but thirds are deducted, though the ship be new or on her first voyage: 2 Phillips, s. 1431; 2 Parsons, 384.

(*h*) See Stevens, Av. 172.

(*i*) Poingdestre *v.* Royal Exch. Ass. Co. (1826), Ryan & Mood. 378.

Sect. 1028. Thus, where the assured was prevented from regaining possession of his ship by the fault of the underwriters in refusing to pay a bottomry bond for repairs incurred by their direction and at their expense, by reason of which the ship was sold to satisfy the bond, &c., it was held that they were not entitled to deduct their thirds (*k*); but where the failure to regain possession of the ship arises from the default of the assured himself, it has been held, in the United States, that the exception does not apply and that the underwriters are entitled to the deduction (*l*).

No thirds deducted for anchors.

1029. It is not, however, every part of the ship's furniture and apparel, in respect of which thirds are to be deducted; thus, we have already seen that certain exceptions are formally recognized by the Association of Average Adjusters, not only as regards iron ships generally, but also as to ironwork in wooden ships. Similarly, the cost of replacing anchors is not subject to this deduction, as anchors are considered not to lose in value by being used (*m*). The deduction from chain cables is fixed at one-sixth (*n*). As to metal sheathing, the practice is stated by Mr. McArthur (*o*) as follows:—"When the re-metalling of a ship is recoverable under the policy, allowance in full is made in particular average for the cost of a weight of new metal equal to the gross weight of sheathing stripped off, credit being given for the proceeds of the old metal sheets. The remainder of the weight of new metal sheathing put on is placed to the debit of the shipowners, as it is the result of natural wastage corresponding with the fixed deduction on account of wear and tear made from other repairs. In addition to the above, should any sheets have been rubbed off or otherwise altogether lost by sea perils, the cost of the gross weight of sheathing used to replace them is allowed, subject to the deduction of one-third. The expense of stripping off the old and putting on the new

Chain cables.

Metal sheathing.

(*k*) Da Costa *v.* Newenham (1788), 2 T. R. 407.

(*l*) Humphreys *v.* Union Ins. Co. (1824), 3 Mason, R. 429.

(*m*) McArthur, 213; Benecke, 458.

(*n*) McArthur, 214; it was the same when Stevens wrote, Av. 173.

(*o*) Pp. 213, 214.

metal, with the cost of the felt and metal nails used in connection with the re-metalling, is also allowed, less thirds, credit being given for the proceeds of the old nails." Sect. 1029.

In this country thirds are regularly deducted from the cost of painting, unless the ship was on her first voyage. Painting.

1030. As the old materials thrown aside in making the repairs are always of some, and occasionally of considerable value, it is important to ascertain whether the proceeds of such old materials are to be deducted from the gross expense of the repairs before or after deducting the one-third new for old. It has been decided in the United States that the true rule is to apply the old materials towards payment of the new, as far as they will go, and then to deduct the third from the balance (*p*). Arnould (*q*), agreeing with Phillips (*r*), considered this to be the correct rule. In this country, however, the practice is the other way, *i.e.*, first to deduct the third, and then to deduct the value of the old materials (*s*). To the present editors the English practice appears to be best supported by principle, the value of the old materials being accepted in part payment of the cost of the repairs (*t*). The third is deducted not from the expense of the materials alone, but from that of the labour and materials conjointly (*u*).

From what the one-third is deducted.

1. From the cost of repairs before deducting the value of the old materials.

2. From the expense of both labour and materials.

In England no thirds are deducted from graving dock expenses, use of appliances, &c. Phillips, however, cites (*x*) with approval a case where similar deductions were allowed in Boston, United States. And in England the deduction is in practice allowed from any increased expenditure which

Incidental expenses, such as marine interest.

(*p*) Byrnes *v.* National Ins. Co. (1823), 1 Cowen, R. 265; American Ins. Co. *v.* Center (1829), 4 Wendell, R. 5.

(*q*) 2nd ed. p. 1001.

(*r*) Ins. vol. ii. s. 1434.

(*s*) McArthur, 219; Gow, 219; Lowndes, s. 183 (2nd ed.).

(*t*) The different results of the two rules may be illustrated as follows: A damaged mast is replaced at a cost of 300*l.*, and after it is taken out is worth 30*l.* In England the underwriter pays 200*l.* less 30*l.*, *i.e.*, 170*l.* By the American rule he pays two-thirds of 270*l.*, *i.e.*, 180*l.* The theory is that the mast before it was damaged was worth 200*l.* Therefore, according to the English practice, the assured receives an exact indemnity; according to that of America he is the gainer by 10*l.*

(*u*) Benecke, Pr. of Indem. 458.

(*x*) 2 Phillips, s. 1432.

Sect. 1030. may be incurred in raising funds for the repairs, such as the marine interest on a bottomry bond, although it cannot be said that the ship is in any way benefited by such increase of expenditure. This practice is supported by a decision of the Supreme Court of Massachusetts (*y*), but appears difficult to support in principle, and is well criticised by Mr. McArthur (*z*).

Extra cost of repairs at port of distress is a charge on the underwriter.

1031. Where repairs are necessarily done to a ship in a port of distress, and, as will frequently be the case, cost more there than if done in the home port, it has been made a question at what rate they should be paid for by the underwriters on ship—at that of the port of distress or the home port (*a*). The former appears unquestionably to be the true rule of adjustment, as the necessity of repairing the ship in the port of distress which occasioned the increased expense was an immediate consequence of one of the perils insured against; accordingly, this is the rule adopted in practice in all cases of necessary repairs at a foreign port, the underwriter being of course entitled to deduct his thirds (*b*).

Temporary repairs made at a foreign port.

In one case in the United States where full repairs might have been made abroad, but at an expense much greater than they would have cost at home, and the master chose to pursue his voyage with temporary repairs merely, the cost of such temporary repairs, and also the subsequent permanent repair rendered necessary after the ship's arrival in her home port, were both included in the particular average (*c*). Even

(*y*) Orrok *v.* Commonwealth Ins. Co., 38 Mass. 456. "In case of a partial loss, where money is taken up on bottomry, the underwriters have nothing to do with the bottomry bond, but are simply bound to pay the partial loss, including their share of the extra expenses of obtaining the money in that mode as a part of the loss." Per Story, J., in Bradlie *v.* Maryland Ins. Co. (1838), 12 Peters, S. C. R. 405, 406.

(*z*) Mar. Ins. p. 214.

(*a*) Magens, vol. i. p. 54, and case xx. p. 255.

(*b*) Benecke, Pr. of Indem. 459—461. The thirds are in practice deducted from the actual cost of the repairs, wherever effected. This system may undoubtedly operate hardly on the shipowner, *e.g.*, in cases of repairs at a port of refuge which frequently cannot be effected except at excessive prices. See remarks by Mr. McArthur (Mar. Ins. p. 214, n.), who, however, defends the practice.

(*c*) Brooks *v.* Oriental Ins. Co. (1829), 24 Mass. 259.

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though the underwriters refuse their assent to the repairs being done in a particular way, yet the assured may, it seems, proceed to such repairs, and, if they are necessary and done properly, the underwriters will be liable (*d*).

Cost of replacing goods sold for repair of ship is average.

Goods necessarily sold in a port of distress to defray the cost of repairing the ship are, if the ship reach her port of destination, to be paid for at their clear value at the port of destination. But if they sold for more in the port of distress than they would have realized in the port of destination, the merchant is entitled to receive from the shipowner the higher price (*e*).

Expense of repairs actually made before total loss may be recovered cumulatively as average,

1032. If a ship have been actually repaired in a port of distress, and be afterwards totally lost before arriving at her port of destination, the cost of such repairs may be recovered cumulatively in addition to the total loss, either *quâ* average, or as money laid out and expended in labouring for the safeguard and recovery of the ship under the general printed clause in the policy (*f*). This rule, however, only applies to repairs actually made; hence where a ship put back twice in distress, and on the first occasion was actually re-coppered, but on the second occasion was only surveyed, but not repaired, and in the course of the survey some of her wales, &c., were necessarily removed, in order to examine her timbers, and never replaced, but sold with the rest of the ship as wreck, it was held, that the cost of the re-coppering might be recovered in addition to a total loss, but not the estimated expense of replacing the wales (*g*). Moreover, it appears that the rule only applies to repairs for

but not the estimated cost of repairs not in fact made.

(*d*) Waller *v.* Louisiana Ins. Co. (1821), 9 Martin, 276.

(*e*) Alers *v.* Tobin (1802), Abbott, Shipping, 245, 5th ed., and the law there laid down; Atkinson *v.* Stephens (1852), 7 Exch. 567; Richardson *v.* Nourse (1819), 3 B. & Ald. 237.

(*f*) Le Cheminant *v.* Pearson (1812), 4 Taunt. 367. So, in America, Matheson *v.* Equitable Marine Ins. Co. (1875), 118 Mass. 209, where the rule is said to be part of the general law of marine insurance.

(*g*) Stewart *v.* Steele (1842), 11 L. J. (N. S.) C. P. 155; 5 Scott, N. R. 927. See, however, criticism of this case (at least, as reported in Scott) by Brett, L. J., 9 Q. B. D. at p. 213.

Sect. 1032. which the owners were themselves liable to pay. Where, therefore, the cost of the repairs is discharged by means of moneys raised on bottomry, repayable only in the event of the ship's safe arrival, the owners, being released from payment by the loss of the ship, cannot recover from their underwriters for a loss which they have in fact never suffered (*h*). Where no such repairs have been made, no previous partial loss by sea-damage can be recovered from the underwriter, as a particular average, in addition to a subsequent total loss (*i*); the less is there swallowed up by the greater, and both form but one loss (*k*). So, too, if the subsequent total loss occur during the currency of the policy, but be not due to a peril therein insured against, the underwriter pays nothing. But if the average loss unrepaired have occurred during the currency of one policy, and the subsequent total loss occur during the currency of another policy, and after the expiration of the first policy, the assured is entitled to recover under both policies, *i.e.*, for the average loss as well as for the total loss, if they be due to perils insured against (*l*).

Owner may elect to repair, instead of claiming for total loss.

1033. In case the damage sustained by the ship be such that the expense of repairs would be greater than her value when repaired, although the assured might abandon upon due notice given and claim as for a constructive total loss, yet he is not bound to do so; he may repair her if he choose, and if he do, the same rule of adjustment applies.

A ship of the actual value of 3,000*l.*, valued in the policy at 2,600*l.*, upon which the defendants underwrote 1,200*l.*, sustained such damage on her voyage that when towed into Queenstown Harbour she was worth only 998*l.* without deducting salvage and general average. The owner chose to repair his vessel, and by means of a large outlay made her

(*h*) The Dora Forster, [1900] P. 241, Barnes, J., citing 2 Phillips, Ins. s. 1267.

(*i*) Livie *v.* Janson (1810), 12 East, 648.

(*k*) Knight *v.* Faith (1850), 15 Q. B. 649.

(*l*) Lidgett *v.* Secretan (1871), L. R. 6 C. P. 616; Livie *v.* Janson, *ubi supra*; Knight *v.* Faith (1850), 15 Q. B. 648.

when repaired worth 7,000*l.* From the insurers he claimed 100*l.* per cent., and notwithstanding the argument at the bar that the assured would be making a large gain out of what was a mere contract of indemnity, by getting a vessel worth 7,000*l.* instead of one that had been worth 3,000*l.* only, it was held in all the three Courts that he was entitled to 100*l.* per cent.—*i.e.*, 1,200*l.*, the full amount insured (*m*). Sect. 1033.

1034. On the other hand, if the ship after sustaining an average loss is sold by her owner unrepaired, the measure of what he is entitled to recover against the insurer is the estimated cost of repairs less the usual deduction, not exceeding the depreciation in value of the vessel as ascertained by the sale. Such, at least, was the view taken by Lindley, J., and by the majority of the Court of Appeal, in a case of which the facts were as follows:— Adjusting an average loss on ship sold unrepaired.

A ship valued in a time policy at 3,700*l.* was worth 4,000*l.* at the time of her leaving Singapore for Moulmein, which was the commencement of the risk. When near to Moulmein she took the ground, and remained aground for four days in considerable danger; she was got off, however, but with so much damage to the hull that notice of abandonment was given to the insurer. This notice was not accepted, but a request was made to the owner to repair; and he, after doing some trifling repairs, sold her in effect unrepaired for 3,897*l.* He then claimed two-thirds of the amount of her estimated repairs—viz., 781*l.*—from the insurer, who paid into Court 245*l.*, including in that sum certain general average expenses; and the question was whether under the circumstances the assured was entitled to the estimated expense of the repairs, although they had not been executed. Pitman *v.* Universal Mar. Ins. Co.

Lindley, J., before whom the case was tried, found that the sound value of the ship at Moulmein was 4,000*l.*, and held that the assured was entitled to the difference between the

(*m*) Lohre *v.* Aitchison (1877—79), 2 Q. B. D. 501; 3 Q. B. D. 558; Aitchison *v.* Lohre (1879), 4 App. Cas. 755. See also Woodside *v.* Globe Marine Ins. Co. (1895), 1 Com. Cas. 237.

Sect. 1034. proceeds of the sale, less the actual repairs done, and the sound value of the ship, the same being applied to the value in the policy in determining the amount payable by the insurer. His decision was affirmed by Jessel, M. R., and by Cotton, L. J., diss. Brett, L. J., and the rule, in the terms stated above, was formulated in the course of his judgment by Cotton, L. J. (*n*).

On the other hand, the view of Brett, L. J., was that the estimated cost of the repairs was in all cases the criterion of loss, and that to allow damages so ascertained to be limited by the fact that the shipowner had in the particular case determined to sell, and had been able to secure a peculiarly good bargain, was to import considerations of fortuitous circumstances alien to the contract of insurance. And in answer to the argument that the shipowner would in such event be making a profit out of a contract of indemnity, his Lordship pointed out that this, owing to the circumstances of particular cases, was not infrequently the result, as in Lohre *v.* Aitchison. It is impossible not to feel the force of this powerful dissenting judgment, in view of which the law can hardly yet be regarded as finally settled.

Incidence of an expenditure by which more than one interest has been benefited.

1035. An interesting and difficult question has lately been discussed in our Courts as to the amount properly chargeable to particular average in cases where, by reason of certain expenditures, more that one interest has been benefited. For instance, a vessel may be taken into dry dock for one specific purpose, but this may well afford an opportunity for other work to be done on her, and, by effecting the two operations at one time, dock dues will be saved. Under such circumstances, should a proportion of the expenses be charged to different accounts, so that each may share in the advantage so obtained, or must the whole be charged to the account

(*n*) Pitman *v.* Universal Mar. Ins. Co. (1882), 9 Q. B. D. 192. Cf. also Bristol Steam Navigation Co. Ltd. *v.* Indemnity Mutual Ins. Co. (1887), 57 L. T. 101; 6 Asp. M. C. 173, a case which, however, might perhaps have been decided, as it was, in favour of the underwriters, even apart from the authority of Pitman's Case.

for which the expenditure was primarily intended to be incurred? Sect. 1035.

The facts in the case of The Vancouver (*o*) were as follows:—The vessel, having completed a voyage from Hong Kong to San Francisco, was found to have a very foul bottom, which so much affected her speed as to make it necessary for her owners to put her into dry dock for the purpose of being cleaned, scraped, and painted, before putting to sea again. She was therefore put into dry dock for this purpose only. It was thereupon discovered for the first time that she had sustained certain particular average damage at sea, consisting in the fracture of her stern-post. The damage was repaired in eight days, during the first three of which the cleaning, &c. was also going on. The result was that the two operations, by being effected concurrently, took three days less to effect than if they had each been effected separately, and three days' dock dues were saved. The question in the case was whether the damage to the stern-post was average exceeding 3*l.* per cent. within the meaning of the memorandum. The figures showed that if no part of the dock dues in respect of the first three days (in addition to the whole amount of dues for the last five days) was to be deemed as having been incurred on account of the particular average repairs, then the cost of such repairs was less than three per cent. It was held, however, by the House of Lords, affirming the Court of Appeal (Lord Esher, M. R., and Fry, L. J., Baggallay, L. J., dissenting(*p*)), that an apportioned part of the dock dues for the first three days was to be considered as part of the cost of the repairs, and that under the circumstances, as the operations were simultaneously performed, the cost should be attributed in moieties to the two operations. The result of an apportionment on this basis was to saddle the underwriters with liability. The Vancouver.

(*o*) The Marine Ins. Co. *v.* The China Trans-Pacific S.S. Co. Ltd. (1886), 11 App. Cas. 573.

(*p*) Baggallay, L. J., agreed, however, that there should be an apportionment, and only differed as to the principle on which the amount of the apportionment should be calculated.

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Ratio decidendi of The Vancouver.

Lord Esher's judgment.

1036. It is not easy to gather what were the precise reasons on which the members of the House of Lords based their decision. The opinion of Lord Esher, however, in the Court of Appeal is clear and intelligible, and it appears to have been substantially adopted by their Lordships. He observes (*q*) :—"Now, the question seems to me to be reduced to this. How much of the payment for the dock would be attributed as a matter of business to the use of the dock for the one purpose, and to the use of the dock for the other? Inasmuch as the burthen on the dock is not increased by either, inasmuch as the advantage to each of them is the same, it seems to me that any man taking a business view of the matter would say: As there is a particular sum for the use of the dock to be paid for the two purposes, and the burthen on the dock is not increased by the two transactions going on together, but the advantage to the two persons is equal, supposing they had to be carried on by different persons, those different persons ought to pay half the expenses whilst the dock was being used equally by both of them. Whenever it is used, it is used equally by both of them, although the repairs of the one kind might cost far less than the repairs of the other. Supposing the repairs to the stern-post in twelve hours, by reason of the wages of engineers or skilled workmen, would cost three times as much as the repair by cleaning, nevertheless the use of the dock is equally useful to each party if they were two separate parties. If that would be so if there were two separate parties, it makes no difference to my mind that both the transactions are by the one party. If he had to divide what it had cost him in respect of each, he would deal with the matter in the same way as if each of those things had been done by separate people, or by himself and another person. You cannot shew that money was paid for either particular purpose because the same man has paid for both; but the true way to treat it is to say, as a matter of business, that he paid during the same number of days in which both operations were going on half the dock

(*q*) 11 App. Cas. at p. 579.

dues in respect of one operation and half the dock dues in respect of the other. Therefore, during the earlier days of the transaction here, half the dock dues were paid in respect of the repairs of the stern-post and half the dock dues were paid in respect of the use of the dock for the cleaning of the ship. The dock dues are certainly part of the cost of the repairs if nothing else happens; the cost of the repairs is the cost of the workmen upon the ship, and the materials, and all the payments for the use of the dock, which is a necessary preliminary to being able to do the other work. Therefore, if half of these dock expenses during the common days is paid by the shipowner in respect of the repairs to the stern-post—in other words, is part of the cost of repairing the loss which was occasioned by the sea peril,—and if that half is to be so attributed, then what this shipowner paid for repairs was larger than three per cent. of the value of the ship in the policy. The condition is satisfied, and the underwriter is liable to pay the amount of the average loss." Sect. 1036.

Before proceeding to deal with the next case, it will be well to call attention to certain circumstances in relation to the case of The Vancouver. Firstly, the only point as to which discussion arose was as to charges for the use of the dock: there was no question as to expenses of getting in or out of the dock. Secondly, although the vessel was necessarily taken in for the purpose of cleaning, and for this purpose alone, yet it was even more necessary that the particular average repairs should be effected then and there. Thirdly, the question in The Vancouver case was simply whether, for the purposes of the memorandum, the shipowner's method of estimating the percentage which his particular average bore to the whole value of the vessel, was or was not the correct method, so as to entitle him to recover the whole.

1037. We now proceed to consider the case of The Ruabon (*r*), which also went to the House of Lords. The The Ruabon

(*r*) Ruabon S.S. Co. Ltd. *v.* The London Assurance, [1897] 2 Q. B. 456; [1898] 1 Q. B. 722; [1900] App. Cas. 6; 2 Com. Cas. 295; 3 Com. Cas. 148; 5 Com. Cas. 71.

Sect. 1037. vessel, having in the course of a voyage run aground, was taken to Cardiff, where, in January, 1896, she was put into dry dock for the purpose of having her average repairs effected, in respect of which her underwriters were admittedly liable. In November, 1896, it would have been necessary for her to be docked and surveyed in order to retain her classification at Lloyd's, and her owners accordingly took advantage of the opportunity and had her surveyed whilst in dock for the repairs. The claim of the plaintiffs, her owners, against the underwriters included sums for towage, pilotage, dock dues, &c. The underwriters claimed that, under the circumstances, part of the docking expenses (*s*) should be borne by the owners. Mathew, J., considered that the case was covered by the decision of the House of Lords in The Vancouver case, and held, accordingly, that the underwriters were entitled to make the deduction which they claimed, and this decision was affirmed in the Court of Appeal. The Lords Justices (A. L. Smith, Chitty and Collins, L. JJ.) were unanimously of opinion that, in so far as the dock dues were concerned, The Vancouver case was in point and undistinguishable. But as regards the expenses of getting in and out of dock there was a difference of opinion. A. L. Smith, L. J., considered that these expenses were covered neither by the decision in The Vancouver case itself nor by the principles there affirmed. He regarded this expenditure as having been incurred solely on account of the particular average repairs, and held that it was therefore chargeable to the underwriters in its entirety. The other members of the Court, however, thought that these expenses were incidental to the operation of docking, and, agreeing

(*s*) It is not quite clear from the reports whether the dock dues, as well as the cost of putting in and out of dock, were in dispute. In 2 Com. Cas. 295, it is expressly stated that the defendants had paid all the dues for the use of the dock, and were only claiming that the expenses of bringing her in and taking her out again should be divided. But it is quite clear that the Court of Appeal and the House of Lords dealt with both.

with Mathew, J., that they were covered by The Vancouver case, affirmed his decision. Sect. 1037.

1038. But the House of Lords took an entirely different view, and held that the whole of the expenses were chargeable to the underwriters. On two separate and distinct grounds it was there declared that the opinions not only of Chitty and Collins, L. JJ., but also that of A. L. Smith, L. J., in so far as he concurred with them as to the dock dues, were untenable. As to The Vancouver, the view of Lord Halsbury, L. C., in which Lords Macnaghten and Morris concurred, was that it was merely a decision as to the way in which, for the purposes of the memorandum, the extent of damage ought to be calculated. "What the Court had to determine was the liability under the policy in question, and with reference to that question, which, be it observed, is to be measured by what the damage would cost to repair, the Court held that the dock dues were part of the cost, and that, under the circumstances, as the operations were simultaneously performed, the cost should be attributed (let the phrases be noted) in moieties to the operations of those two persons interested. Now the owner paid the dock dues, and, if he had not done so, the underwriter would undoubtedly have had to pay for dock dues, and if he had, the amount paid would have been over three per cent. It came, in fact, to a calculation of the extent of the damage done, and, that being measured by its cost of repair, it was held that the three per cent. was reached. What Lord Herschell meant is, I think, sufficiently explained by what he says in commenting on the case of Pitman *v.* Universal Marine Insurance Co. (*t*) as to the mode in which the particular average loss was to be arrived at in that case. He says: 'All the judges were, I think, agreed that where there is a partial loss in consequence of injury to a vessel by perils insured against, he is entitled, as a general rule, to recover the sum properly expended in executing the necessary repairs, less the usual allowances'" (*u*).

Distinction drawn in the House of Lords between The Ruabon and The Vancouver.

Lord Halsbury's view.

(*t*) (1882), 9 Q. B. D. 192. (*u*) Per Lord Halsbury, [1900] App. Cas. at p. 14.

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Lord Brampton's view.

The Vancouver was distinguished on a second ground by Lord Brampton, whose judgment was approved by Lord Davey. The view of these noble Lords was that The Vancouver only applied to cases where two operations are essentially necessary to be performed upon the hull of the ship, in order to render her fit to be sent to sea. "If the respondent's claim for contribution was allowed," said Lord Brampton (*x*), "I see no reason why such a claim might not be made against an owner who while his ship was in dry dock sold her, subject to immediate inspection and survey by his purchaser." His Lordship further points out (*y*) that "the survey of Lloyd's surveyor was in no way necessary for any purpose connected with the work performed on the vessel, but was only made to entitle the owners to re-classification at Lloyd's and need not have been made at that moment, nor at any particular time, so long as it was made within the time limited by Lloyd's rules, which had then nine months to run."

1039. The difficulty presented by The Vancouver case being disposed of, it will suffice to quote Lord Halsbury's view as to the argument by which, independently of such authority, the underwriters were seeking to maintain their position. "This is the first time in which it has been sought to advance" the principle of contribution "where there is nothing in common between the two persons, except that one person has taken advantage of something that another person has done, there being no contract between them, there being no obligation by which each of them is bound, and the duty to contribute is alleged to arise only on some general principle of justice, that a man ought not to get an advantage unless he pays for it. So that if a man were to cut down a wood which obscured his neighbour's prospect and gave him a better view, he ought upon this principle to be compelled to contribute to cutting down the wood. Or, if a man built a

(*x*) [1900] App. Cas. at p. 18. (*y*) At p. 17.

wall so as to shield his neighbour's house from undue wet or danger from violent tempests, he ought to be entitled to contribution because his neighbour has got an advantage from what he did" (*z*). Sect. 1039.

1040. The effect of The Ruabon case is clearly to impair very materially not indeed the authority, but the applicability, of the decision in The Vancouver. It is conceived that, in future practice, no apportionment of expenses should be allowed, except in cases very closely corresponding in their facts to those of The Vancouver. It is doubtful whether, consistently with The Ruabon case, any apportionment can take place, except in cases arising under the memorandum. It is probably correct to say that there can be no apportionment, except in cases where there has been in fact an absolute necessity for the immediate performance of the operation not originally contemplated. Both these conditions were present in The Vancouver case. Upon the first condition particular stress was laid by Lords Halsbury, Macnaghten and Morris in the case of The Ruabon. Upon the second condition equal stress was laid by Lords Brampton and Davey. Result of decisions.

1041. The rule for adjusting a partial loss on freight is very simple—viz., that where the sum insured is less than the value of the interest at risk, the underwriter pays the same proportional part of the loss, that the sum insured is of the value of the freight; if the sum insured equals the value of the interest, then he pays the whole of the loss (*a*). Adjustment of partial loss on freight, profits, &c. Rule of adjustment as to freight.

Freight is generally insured in valued policies, and when this is so the valuation in the policy is the sole basis on which to calculate the amount of indemnity the underwriter has to pay. Where, however, only part of the full cargo to which the valuation was intended to apply is on board, or contracted for at the time of loss, the underwriter can only be called on Rule where only part of full intended cargo is shipped, or contracted for at time of loss.

(*z*) Per Lord Halsbury, [1900] App. Cas. at p. 12.
(*a*) 2 Phillips, Ins. s. 1454.

Sect. 1041. to pay upon such proportion of the amount insured as the part of the cargo on board, or contracted for at the time of loss, bears to the full intended cargo (*b*). Similarly, where part of the freight has been paid in advance, the underwriter only pays such proportion of the amount insured as the freight at risk bears to the whole freight (*c*).

Rule of adjustment in open policies.

In open policies on freight the loss by the general usage of Lloyd's is adjusted upon the gross, and not upon the net freight; and this usage, though considered inconsistent with sound principle, has been sanctioned and acted upon by the Court of Common Pleas (*d*): if, in an open policy on freight, only part of the cargo be on board or contracted for at the time of loss, and this part be totally lost, the underwriters can only be called upon to pay the actual amount of freight on the goods actually lost, together with premiums and costs of insurance (*e*); in fact, in such cases the underwriters, whether in a valued or open policy, shall adjust as for a total loss of part of the freight: paying the same proportion of the sums for which they have subscribed the policy as the freight of the goods lost bears to the full freight, which would have been earned, had the whole intended cargo been loaded and all arrived.

Where only part of full intended cargo on board.

Freight where goods are sent on.

Where the original ship is disabled, and goods are sent on at a lower rate of freight, it has been held in the United States that the loss so occasioned should be adjusted as a salvage loss, *i.e.*, the underwriter pays the whole amount of the insurance, and puts into his pocket the excess of the freight due under the charter-party over the expense of forwarding the goods (*f*).

Under similar circumstances in this country, the shipowner,

(*b*) Forbes *v.* Aspinall (1811), 13 East, 323; Tobin *v.* Harford (1863), 13 C. B. (N. S.) 791; 32 L. J. C. P. 134; 34 L. J. C. P. 37; Denoon *v.* Home & Colonial Ass. Co. (1872), L. R. 7 C. P. 341. See *ante*, ss. 345, 346.

(*c*) The Main, [1894] P. 320.

(*d*) Palmer *v.* Blackburne (1822), 1 Bing. 62.

(*e*) Forbes *v.* Cowie (1808), 1 Camp. 520. Per Lord Ellenborough in 13 East, 326.

(*f*) 2 Phillips, Ins. s. 1441, citing Coffin *v.* Storer (1809), 5 Mass. R. 252; Searle *v.* Scovell (1819), 4 Johns. Ch. C. 218.

having paid the expense of forwarding the goods, recovered the amount from the insurers on freight by an action on the sue and labour clause of the policy (*g*). Sect. 1041.

Where, in the United States, it is agreed to adjust an average loss on profits at the same rate as on the goods out of which they are to arise, and the goods arrive sea-damaged, or part of them is totally lost, this is adjusted as an average loss on profits *pro tanto* (*h*); and the rule there is the same, where part of the goods, owing to the decay produced by sea-damage, are necessarily sold, or thrown overboard in the course of the voyage (*i*). Adjustment on profits where part of goods lost.

1042. In discussing the subject of general average, it has appeared that all extraordinary charges, occasioned by unforeseen and unusual accidents, and incurred for the general safety, were the subjects of general contribution: there are, however, many charges similar in kind, though different in occasion and object, which occur regularly in the usual course of the voyage, and which the master, in the ordinary course of his duty, necessarily furnishes for the purposes of the ship and cargo. These charges are called petty averages, and are never the subject of any claim on the underwriter. Petty averages.

They are all the ordinary charges at the places of loading and unloading, and during the voyage; such as common pilotage, tonnage, light money, beaconage, anchorage, ordinary quarantine, river charges, signals, instructions, passage-money by fortified places, expenses for digging a ship out of the ice when frozen up in the regular course of the voyage, &c. (*k*).

Of course, if any of these charges be incurred for any extraordinary purpose, or to relieve the ship and cargo from impending danger, they will, as we have seen, be general average.

(*g*) Kidston *v.* Empire Marine Ins. Co. (1866), L. R. 1 C. P. 535; 2 C. P. 357.

(*h*) 2 Phillips, Ins. s. 1474, where it appears that the rule is the same, even apart from express agreement.

(*i*) *Ibid.*

(*k*) Abbott, Shipping (5th ed.), 272; Carver, Carriage, s. 587.

CHAPTER VI.

ABSOLUTE TOTAL LOSS.

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Distinction between absolute and constructive total loss.

1043. A TOTAL loss in insurance law is one on account of which the assured is entitled to recover from the underwriter the whole amount of his subscription.

Total losses are either absolute or constructive. An absolute total loss is one which entitles the assured to claim from the underwriter the whole amount of his subscription without giving notice of abandonment.

A constructive total loss is one which entitles him to make such claim on condition of giving such notice.

An absolute total loss takes place when the subject insured wholly perishes, or its recovery is rendered irretrievably hopeless (*a*).

A constructive total loss takes place when the subject

(*a*) La perte réelle est l'anéantissement ou la privation effective des choses assurées. Boulay-Paty on Emerigon, vol. ii. p. 217. So, by the Marine Insurance Bill, "Where the subject-matter insured is destroyed, or irreparably damaged, or where the assured is irretrievably deprived thereof, there is an actual total loss:" sect. 58 (1).

insured is not wholly destroyed, but its destruction is rendered highly probable, and its recovery, though not utterly hopeless, yet exceedingly doubtful (*b*). Sect. 1043.

1044. The distinction between cases of absolute and constructive total loss has nowhere been better pointed out than in the following passages, from the judgment of Lord Abinger, in the leading case of Roux *v.* Salvador :— Doctrine stated by Lord Abinger. Cases of absolute total loss.

"The underwriter," says his Lordship, "engages that the subject of insurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured."

"But there are intermediate cases; there may be a capture which, though *primâ facie* a total loss, may be followed by a re-capture, which would revest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship innavigable, Cases of constructive total loss.

(*b*) In the Marine Insurance Bill, a constructive total loss is defined as follows:—

Sect. 61.—(1) In the case of damage to a ship, there is a constructive total loss where she is so damaged, by a peril insured against, that the cost of repairing the damage would exceed the value of the ship when repaired. In estimating the cost of repairs, the expense of future salvage operations, and any future general average contribution to which the ship would be liable must be taken into account.

(2) Where the assured is deprived of the possession of his ship by a peril insured against, and it is doubtful whether he can recover her, or the cost of recovering her would exceed her value when recovered, there is a constructive total loss.

(3) In any case, other than that of a ship, there is a constructive total loss where the subject-matter insured is so damaged or affected by a peril insured against, that, having regard to cost, it is not reasonable to require the adventure to be prosecuted to its termination.

For the purpose of determining what is reasonable, regard shall be had to the course which would be pursued by a prudent uninsured owner under the circumstances of the case.

Sect. 1044. without any hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination."

Abandonment.

"In all these, or any similar cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it, still exists, and is vested in him, the very principle of indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures at his own cost for realizing or increasing that value. In all these cases, not only the thing insured, or part of it, is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its port of destination, or, at least, of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it."

Consequences of not abandoning.

"If the assured prefers the chance of any advantage that may result to him beyond the value of the thing insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract, because the assured has used his own exertions to preserve the thing insured, or has postponed his claim, till that event of a total loss has become certain, which was uncertain before" (*c*).

(*c*) Per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 286.

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1045. It remains to inquire what kind of casualty amounts to a case of absolute total loss.

What amounts to absolute total loss.

No better or more comprehensive answer can be given to this inquiry than in the words of Lord Abinger, already cited: "If, in the progress of the voyage, the thing insured becomes totally destroyed or annihilated, or if it be placed by the perils insured against in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, the latter is bound, by the very letter of his contract, to pay the sum insured" (*d*).

Principle on which the doctrine of absolute total loss depends.

The great principle, therefore, on which all the cases of absolute total loss depend appears to be this—the impossibility, owing to the perils insured against, of ever procuring the arrival of the thing insured. If, by reason of those perils, the assured is permanently and irretrievably deprived not only of all present possession and control over it, but of all reasonable hope or possibility of ever ultimately recovering possession of, or further prosecuting the adventure upon it, that is a case of absolute total loss, independently of the election of the assured to treat it as such. Notice of abandonment would in such case be a mere idle formality, because nothing remains to be abandoned (*e*). In such cases, therefore, no notice of abandonment is required; but if any remains of the wrecked ship or perished goods ultimately come to hand, or if any money have been realized abroad by their necessary and justifiable sale, such remains, or the net proceeds of such sale, as we shall elsewhere see, are considered as a salvage to which the underwriters are entitled after payment of a total loss (*f*). Hence it is that absolute total losses are familiarly

No notice of abandonment requisite in cases of absolute total loss.

But the remains of the property or its proceeds are a salvage for the benefit of the underwriters.

(*d*) 3 Bing. N. C. 286.

(*e*) *Lex non cogit ad absurdum.* En cas de perte entière le délaissement est une formalité inutile. 2 Emerigon, c. xvii. s. 3, p. 213. "The general convenience of making an abandonment has led to the notion that it is more necessary than it really is: it is only necessary to make a constructive total loss; if the loss is actually total no abandonment is necessary." Per Lord Ellenborough, Mellish *v.* Andrews (1812), 15 East, 13; Rankin *v.* Potter (1873), L. R. 6 H. of L. 156.

(*f*) Per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 288.

Sect. 1045. known in insurance law as "salvage losses without abandonment" [g].

Two classes of cases of absolute total loss.

1046. Such then being the general principle, it will be found that all the cases of total loss in which no notice of abandonment is required may be ranged under the two classes indicated by Lord Abinger—those, viz. in which 1st, the thing insured is wholly destroyed or annihilated by the perils insured against; or 2nd, is by the same perils wholly and irretrievably lost to the assured, so that it is totally out of his power or that of the underwriter to procure its arrival.

With regard to the first head the question arises, What is meant by the words "wholly destroyed or annihilated by the perils insured against" as applied to the subjects of marine insurance?

Annihilation.

It is quite clear that these words cannot mean a change of the thing from entity into nonentity, as that is even a physical impossibility, and must therefore, of course, be thrown out of consideration in treating of a contract of practical indemnity against substantial losses. It is equally clear that if the thing insured go in bulk to the bottom of the ocean, or be reduced by fire to a heap of ashes, though, in either case, its remains have an existence in *naturâ rerum*, yet the thing itself is practically and, as a subject of insurance,

[g] A more correct expression would be "salvage losses without notice of abandonment." The distinction between abandonment and notice of abandonment is pointed out by Brett, L. J., in Kaltenbach *v.* Mackenzie (1878), L. R. 3 C. P. D. at pp. 470, 471, who proceeds as follows:—"There are two kinds of total loss—one which is called an actual total loss, another which in legal language is called a constructive total loss—but in both the assured claims as for a total loss. Abandonment, however, is applicable to the claim, whether it be for an actual total loss or for a constructive total loss. If there is anything to abandon, abandonment must take place, as, for instance, when the loss is an actual total loss, and that which remains of a ship is what has been called a congeries of planks, there must be an abandonment of the wreck. Or where goods have been totally lost, as in the case of Roux *v.* Salvador, but something has been produced by the loss, which would not be the goods themselves, if it were of any value at all, it must be abandoned. But that abandonment takes place at the time of the settlement of the claim; it need not take place before."

wholly destroyed, so as to entitle the assured, without notice of abandonment, to claim a total loss (*h*). Sect. 1046.

1047. On the same principle, if the thing insured in the course of the voyage be, by the perils insured against, reduced to a complete state of dismemberment, so as to have lost its characteristic form, and no longer to subsist under the same denomination as that which it was insured as being, this is an absolute total loss, though its constituent parts may all, or in great proportion, exist separately. Thus, if a ship in the course of the voyage be dismembered by the perils of the seas—if, in a word, she "be wrecked in pieces," so that "her planks and apparel be scattered about in the sea"—this is a clear case of absolute total loss on ship; and it seems equally so where, though her hull may still hold together, yet the ship, as a ship, is destroyed, and subsists only as a wreck; nor is any notice of abandonment requisite in such cases to entitle the assured to claim a total loss (*i*). Wreck involving either complete dismemberment or destruction as a ship.

The great difficulty has arisen in determining when perishable goods shall be so far regarded as wholly destroyed and annihilated, within the true meaning of these words in insurance law, as to give the assured a right to recover the whole sum insured on them without notice of abandonment. In one sense commodities of a perishable nature may be said to be wholly destroyed for any practical purpose when, by the progress of decomposition or other chemical agency, they In case of perishable goods.

(*h*) See 2 Emerigon, c. xvii. s. 3, p. 213. "In matters of business a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it in deep water, though it might be possible, by some very expensive contrivance, to recover it:" per Maule, J., in Moss *v.* Smith (1850), 9 C. B. 103. So, per Sewall, J., Murray *v.* Hatch (1810), 6 Mass. R. 465.

(*i*) Les débris du navire naufragé existent, mais le navire n'existe plus. 2 Emerigon, 213; Cambridge *v.* Anderton (1824), Ry. & Mood. 60; *S. C.*, 1 C. & P. 213; and 2 B. & Cr. 691; see also Bell *v.* Nixon (1816), Holt, N. P. R. 425; and per Lord Watson in Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] App. Cas. at p. 603: "A mere congeries of wooden planks or of pieces of iron which could not without reconstruction be restored to the form of a ship."

Sec. 1[illegible]. [illegible]

Physical change of structure or composition. [illegible]

Illustration. 1[illegible]. [illegible]

Foundering at sea. [illegible]

Submersion. [illegible] on the other hand, they be merely submerged in shallow water, or in water not too deep to leave a fair chance of getting them up again, though only at a very considerable outlay, this is only a constructive total loss, and the assured, in order to recover the whole amount of the insurance, must give due notice of abandonment [illegible].

[illegible] Chap. xvi. s. 3. vol. ii. p. 1[illegible].
[illegible] Anderson v. Royal Exch. Co. 1805, 7 East, 38; Doyle v. Dallas 1831, 1 Mood. & Rob. 48; 2 Phillips, Ins. s. 1527. See also 2 Parsons, Ins. 69—71, where it is pointed out that mere submersion does not necessarily involve a total loss, either actual or constructive. And the authorities cited by these learned writers show that an actual total loss, at any rate, is not necessarily

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On the same principles the assured, on the expiration of the time after which the legal presumption arises that a missing ship has foundered at sea, may claim a total loss without notice of abandonment; for it would, indeed, be absurd to require from the assured a formal abandonment of his chance of recovering that which the law presumes to be irrecoverably lost. If, however, such ship should ultimately chance to turn up, this would be for the benefit of the underwriters, who might claim her as salvage (*m*).

Privation of the *spes recuperandi*.

1049. Every effective privation of the *spes recuperandi* amounts to an absolute total loss: if the thing insured be in the hands of strangers, not under the control of the assured; if, by any circumstances over which he has no control, it can never, or within no assignable period, be brought to its original destination—in such cases the fact of its remaining in specie at any forced termination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his property, whether his inability arise from its annihilation or from any other insuperable obstacle (*n*).

So, "if a ship," says Willes, J., "is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be

thereby constituted. See, too, Kemp *v.* Halliday (1865), 34 L. J. Q. B. 233; and L. R. 1 Q. B. 520, in the Exch. Ch. Nevertheless, in Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] A. C. 593, Lord Halsbury's language seems to suggest, at least, that a ship going to the bottom of the sea does necessarily become not merely a constructive, but an actual total loss. If this was what Lord Halsbury really meant to say, it is submitted that such a view is inconsistent with all prior authority, and considering what can be achieved by modern mechanical science and skill, is also inconsistent with principle. No such point appears to have been taken or relied upon by the appellant's counsel in arguing the case, and such was clearly not the *ratio decidendi* of the other Lords of Appeal, who appear to have treated the case as one of constructive and not actual total loss.

(*m*) Houstman *v.* Thornton (1816), Holt, N. P. 242.

(*n*) See the remarks of Lord Abinger, 3 Bing. N. C. 279, and Cossman *v.* West (1887), 13 App. Cas. 160.

Sect. 1049. used for the purposes of a ship; but if it can be taken to a port and repaired, though at an expense far exceeding its value, it has not ceased to be a ship, and unless there is a notice of abandonment, there is not even a constructive total loss" (*o*).

Goods plundered by wreckers.

Goods were insured "from London to the Isle of France, &c.": the ship was wrecked off the coast of that island, but some of the goods were saved from the wreck, and got on shore there, where, however, they fell into the hands of the natives, who destroyed part and plundered the rest. The assured claimed a total loss. It was objected to his claim that he had given no notice of abandonment. Sir Vicary Gibbs overruled the objection, and said: "An abandonment is not necessary to make this a total loss; the portion of the goods which were saved from the wreck, though got on shore, never came again into the hands of the owners: it is, therefore, a total loss to them" (*p*).

Goods seized by hostile force, and never restored.

Goods insured on a Baltic risk were, with the ship, while in a Swedish port, seized and detained by orders of the Swedish Government. The assured, on receipt of this intelligence, gave a notice of abandonment, which was too late, and wholly inoperative; afterwards, and about two months before action brought, the goods themselves were seized and unladen by a military force acting under the orders of the Swedish Government, and never restored. The Court held that as the loss on the goods continued absolutely total at the time of action brought, the plaintiff might recover accordingly without notice of abandonment (*q*).

Where goods are taken out of ship, condemned and sold, and proceeds not restored before action brought, no

1050. A cargo of saltpetre, shipped in the East Indies by an American citizen, under licence from the Company, was seized at the Cape of Good Hope by a British man-of-war, and sold under decree of the Vice-Admiralty Court for the benefit of the captors; subsequently (before action brought)

(*o*) Barker *v.* Janson (1868), L. R. 3 C. P. 303.

(*p*) Bondrett *v.* Hentigg (1816), Holt, N. P. R. 149.

(*q*) Mellish *v.* Andrews (1812), 15 East, 13.

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this decree was reversed on appeal, but the property, though directed to be, was not restored to the assured. The assured having claimed a total loss, it was objected that he had given no valid notice of abandonment. Lord Ellenborough, however, and the Court of King's Bench held that no such notice was necessary under the circumstances. "If," said his Lordship, "instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship and been restored at last to the owner, I should have thought there was much in the argument that, in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away" (*r*).

notice of abandonment is necessary to make the loss total.

Aliter, where goods are finally restored.

1051. If, indeed, goods are seized and confiscated by a hostile government, subject to a pending claim for their restoration, which ultimately results in the restoration of a part of the proceeds of the goods into the hands of the assured or his agents, before action brought—in such case the assured cannot recover for a total loss without having given due notice of abandonment. Thus, where sugars insured from London to Rotterdam were confiscated and sold by the Dutch Government, but half the proceeds were subsequently restored and paid to the consignees in Rotterdam, who handed them over to the assured, Lord Ellenborough intimated that the assured, after such restoration, could not have brought his action and recovered as for a total loss, unless he had given due notice of abandonment (*s*).

Confiscation of goods followed by ultimate restitution of part of their proceeds before action brought is, apart from notice of abandonment, only an average loss.

In a similar case, where coffee had been seized and confiscated by the Danish Government, but the consignees abroad

(*r*) Mullett *v.* Shedden (1811), 13 East, 304. Cf. Stringer *v.* English, &c. Mar. Ins. Co. (1869), L. R. 4 Q. B. 676; 5 Q. B. 599.

(*s*) Tunno *v.* Edwards (1810), 12 East, 488. Such seems to be the true result of the case, as far as it applies to the distinction now in question.

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were allowed to conduct the sale, and to reimburse themselves, out of the proceeds, the amount of the bills which they had accepted and paid on account of the assured upon the credit of the consignment. Gibbs, J., said: "If the plaintiff had brought an action after this salvage (*i.e.*, the amount received by him from the consignees on their acceptances, and which had been allowed them out of the proceeds of the sale for a total loss, the defendant would have nonsuited him for want of an abandonment. I do not state that, upon seizure, the plaintiff might not sue for a total loss without abandonment, but after the restoration, no abandonment having been declared in the meantime, that which was for a time a total loss became an average loss; and then, all that is restored is restored for the benefit of the assured, not of the underwriter" (*t*).

Result of these cases.

In these two cases the point as to notice of abandonment was only indirectly raised, and the true result of both appears simply to be, that the assured, on seizure and confiscation of his goods, may claim a total loss without notice of abandonment if he pleases; that if no restoration takes place before action brought, he may recover in such action the whole amount he claims; but if, before that time, a restoration of part of the proceeds takes place, he can only recover an average loss. In order to recover as for a total loss under such circumstances, in any event he must give due notice of abandonment. In fact, as Lord Ellenborough says in Mellish *v.* Andrews, "where there is an abandonment, the risk is thrown on the underwriters; where there is no abandonment, the party takes the chance of recovering according to his actual loss" (*u*).

Where thing insured subsists in specie, and there is a chance of its recovery, notice of aban-

1052. In the case of Tunno *v.* Edwards, Lord Ellenborough says: "Is it not an established and familiar rule of insurance law that, where the thing insured subsists in specie, and there is a chance of its recovery, in order to make it a total loss

(*t*) Goldsmid *v.* Gillies (1813), 4 Taunt. 802.

(*u*) Mellish *v.* Andrews (1812), 15 East, 16.

there must be an abandonment?" This is no doubt the rule, but then both its terms must be carefully attended to; the mere fact that the thing insured subsists in specie at the time of the loss does not render it necessary to give notice of abandonment, unless there is also at that time a chance of its recovery; where there is no such chance, the mere circumstance of its subsisting in specie at the time of the casualty is of no importance. "The loss," as Lord Abinger says, "is, in its nature, total to him who has no means of recovering his property, whether his inability arise from its annihilation or from any other insuperable obstacle" (*x*).

Sect. 1052. donment is necessary to make a total loss. Where there is no such chance, the fact of its subsisting in specie at the time of the casualty or sale is of no importance.

Even where such a loss has taken place, followed by sale, the assured may by his own conduct, in electing to take to the proceeds of the sale, instead of making his claim against the underwriters, if he thereby alters the position of facts so as to affect their interests, forfeit his claim to recover for a total loss (*y*).

Assured, by taking to proceeds of sale, may waive his right to recover as for a total loss.

And so, *e converso*, even in a case where they would otherwise be entitled to notice of abandonment, the underwriters, by their own conduct, may forfeit the right to insist upon it; as where the assured, on hearing that his ship has put into port to repair in a disabled state, expresses his desire to the underwriters to abandon, but they dissuade him from it, and order the repairs to be made at their expense; this supersedes the necessity for any notice of abandonment, and the assured without it may recover the whole amount of the insurance (*z*).

So the underwriter may waive his right to notice of abandonment.

1053. We proceed to consider the application of these principles to the case of the ship.

Absolute total loss of ship in cases of wreck, or irreparability followed by sale.

Where the ship in the course of the voyage, and by the agency of the perils insured against, becomes an absolute wreck, broken in pieces and dismembered, so that "her planks

Where the ship is wrecked in

(*x*) Per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 279.

(*y*) Mitchell *v.* Edie (1787), 1 T. R. 608. And see, per Lord Abinger, Roux *v.* Salvador (1836), 3 Bing. N. C. 286. See, also, *S. P.* Allwood *v.* Henckell (1795), 1 Park, Ins. 399.

(*z*) Da Costa *v.* Newnham (1788), 2 T. R. 407.

Sect. 1053. and apparel are scattered on the sea" : this is a case of absolute total loss of ship, "although the whole or a greater part of the fragments may reach the shore as wreck" (*a*). In such case it is quite clear that the ship as a ship is totally destroyed—the ship has perished, only the wreck remains. *Les débris du navire naufragé existent, mais le navire n'existe plus* (*b*).

Perils, no case of abandonment is requisite.

In such a case the assured may undoubtedly recover the whole amount of the insurance without notice of abandonment, the wreck being salvage for the benefit of the underwriter.

True view of Cambridge v. Anderton.

1054. The case of Cambridge *v.* Anderton appears to the present editors to be merely a somewhat strong instance of this principle. The facts of this case were as follows:—A timber-laden ship, insured from Quebec to Bristol, in sailing down the St. Lawrence struck upon the rocks, and got so fast set that the master, after making every possible effort, could not get her off, but was obliged to leave her there exposed to a heavy sea. By surveyors and, amongst others, a Lloyd's agent from Quebec, she was examined and found to be so damaged that, although still retaining the form of a ship, she was only saved from going to pieces by the timber which formed the greater part of the cargo; and, in the judgment of the surveyors, the expense of getting her off the rocks (if that could be accomplished), and repairing her, would exceed her value when repaired. They, therefore, advised the master to sell her, which he, in ignorance of the insurance, did, together with her register; and the purchaser, having succeeded in getting her off the rocks, repaired and sent her on another voyage (*d*), at the outset of which she

(*a*) Per Dallas, C. J., in Bell *v.* Nixon (1816), Holt, N. P. 423.

(*b*) Opinion of the Judges delivered to the House of Lords, in Irving *v.* Manning (1847), 1 H. L. Cas. 287.

(*c*) 2 Emerigon, c. xvii. s. 3, p. 213.

(*d*) It may occur here to the reader to ask how, if the vessel was actually repaired and subsequently sailed on another voyage, the Court in banc could properly have called her a mere congeries of planks at the time of the sale. A reference to the report in 1 C. & P. 214 shows that the vessel was never made seaworthy to the satisfaction of her officers, who declared that they would not have trusted their lives in her even after

was lost in the Gulf of St. Lawrence. The plaintiff, who had never given notice of abandonment, brought his action for a total loss. Sect. 1054.

Lord Tenterden told the jury that the question was, whether this was a total or a partial loss, and that, in considering that question, they should look, not so much at the acts of the parties, whether buyers or sellers, as at the state of the ship itself. "If," said his Lordship, "the jury are of opinion that this vessel could not be repaired at all, or that she could not be repaired without incurring an expense equal to or greater than her value, then I shall hold, that, although she may exist in the form of a vessel, and be afterwards sold with her register, the plaintiff will be entitled to recover as for a total loss, with benefit of salvage" (*e*). The jury found a verdict for a total loss.

The Court in banc refused to disturb that verdict by sending the case to a new trial. Lord Tenterden on that occasion said: "If the subject-matter of insurance remained a ship, it was not a total loss; but if it were reduced to a mere congeries of planks, the vessel was a mere wreck: the name you may think fit to apply to it cannot alter the nature of the thing." Bayley, J., on the same occasion, said: "I take the legal principle to be this: if, by means of any of the perils insured against, the ship ceases to retain that character and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss without notice of abandonment" (*f*).

From the above statement of the case, founded upon a collation of the two Nisi Prius reports with those in banc, the ship at the time of the sale appears to have been regarded as "a mere congeries of planks," or, as Lord Tenterden

the so-called repairs. The Court in banc must obviously have accepted the evidence to this effect.

(*e*) 1 Ry. & Mood. 61; and see, also, 1 C. & P. 214.

(*f*) Cambridge *v.* Anderton (1824), 2 B. & Cr. 691; 4 Dowl. & Ry. 203; *S. C.*, Ry. & Mood. 60; 1 C. & P. 213.

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expressed himself in a subsequent case, "no longer to be deemed a ship, but rather materials for another ship" (*g*).

On this view of the facts, irrespective of the sale by the master, it was quite impossible for the underwriter to contend that the plaintiff had not suffered an absolute total loss. The case, therefore, does not appear to establish any doubtful point of law (*h*).

And there is an absolute total loss where the ship, though not a complete wreck, is necessarily sold by the master where she lies.

1055. It is now also established in our jurisprudence that where the damage is short of a complete wreck or actual dismemberment—although, that is, her hull may hold together, and the form of a ship remain—yet, if the damage be so great as to make it wholly impossible for the master, by any means in his power, to repair her so as to keep the sea as a ship, or to do so except at a cost that would exceed the ship's value when repaired; and the master consequently, acting *bonâ fide* and as a prudent owner would, if uninsured, sells the ship where she lies—the assured may treat this as an absolute total loss of the ship, and recover the whole amount of the insurance without giving notice of abandonment (*i*).

(*g*) Allen *v.* Sugrue (1828), Dans. & Ll. 192.

(*h*) Such appears to be the view taken of this case by Phillips, vol. ii. s. 1495. Arnould, however (2nd ed. pp. 1028 and following), regarded it as an important legal decision on the effect of a sale of a vessel in a damaged condition. See also per Tindal, C. J., in Roux *v.* Salvador, 1 Bing. N. C. 539. The judgments, however, do not seem to lay any stress on the fact of sale, the point throughout insisted on being that the vessel was, prior to the sale, a total wreck. This being so, it is obvious that the sale, inasmuch as it could not make her any more of an absolute total loss than she was before, was, for the purpose of the decision, an immaterial fact.

In Levy *v.* Merchants' Mar. Ins. Co. (1885), 1 Times L. R. 228, the facts were very similar. There was an insurance against absolute total loss only; the vessel first became a constructive total loss, but afterwards sustained so much further injury by exposure to the winds and waves as to become a complete wreck, and she was sold without prejudice to the rights of any person. Mathew, J., in giving judgment in favour of the shipowner on the ground that there was an absolute total loss prior to the sale, appears to have taken the same view of Cambridge *v.* Anderton as that suggested above.

(*i*) Idle *v.* Royal Exch. Ass. Co. (1819), 3 Moore, 115; 8 Taunt. 755; Robertson *v.* Clarke (1824), 1 Bing. 445; Robertson *v.* Carruthers (1819), 2 Stark. 571; Cambridge *v.* Anderton (1824), Ry. & Mood. 60; 2 B. &

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In other words, the "right sale" of a vessel will convert a constructive into an absolute total loss. It is not, however, the mere fact of sale which entitles the assured to recover without notice of abandonment; in the language of Bayley, J., "there is no such head in insurance law as loss by sale" (*k*); that which entitles the assured to treat the loss in such cases as absolutely total, is the sale supervening upon the state to which the ship has been reduced by the perils insured against previous to the sale, and which alone justified the master in selling. The loss, in fact, before the sale must be constructively total, in order to enable the assured after the sale, to recover for it as an absolute total loss, without notice of abandonment. The mere fact of the sale will not have the effect of converting an average into a total loss (*l*).

No such thing as loss by sale.

1056. The doctrine in its application, effect and consequence is very tersely expounded by the Court of Common Pleas in the case of Farnworth *v.* Hyde. The jury in that case had found that the sale of both ship and cargo (the cargo being

Effect of sale when justifiable.

Farnworth *v.* Hyde.

Cr. 691; Doyle *v.* Dallas (1831), 1 M. & Rob. 48; Gardner *v.* Salvador (1831), *ibid.* 116; and see judgment of Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 288, and the observations of Willes, J., to the same effect in Barker *v.* Janson (1868), L. R. 3 C. P. 303. Parsons (vol. ii. pp. 80—90) insists with some force that mere *bona fides* is insufficient, the sale must also be necessary: "Necessity and good faith must concur": Patapsco Ins. Co. *v.* Southgate (1831), 5 Peters, R. 604. And this position was confirmed in this country by the high authority of the Privy Council in Cobequid Mar. Ins. Co. *v.* Barteaux (1875), L. R. 6 P. C. 319, in which case their Lordships quoted with approval a passage from Arnould (2nd ed. p. 236; this ed. s. 203) to the same effect. See also Australian Steam Navigation Co. *v.* Morse (1872), L. R. 4 P. C. 222; Kaltenbach *v.* Mackenzie (1878), L. R. 3 C. P. D. 467. The cases, however, differ as to what circumstances constitute such a necessity. The facts of the other cases already cited in this note, with the possible exception of Robertson *v.* Carruthers, are consistent with this view, although the language reported to have been used does not always go so far.

(*k*) In Gardner *v.* Salvador (1831), 1 Mood. & Rob. 117. So, too, per Maule, J., in Navone *v.* Haddon (1850), 9 C. B. at p. 44, who also points out that a sale of goods prudently effected by the owner thereof in his own interest is not necessarily a right sale as against underwriters.

(*l*) See the very able argument of Maule, J. (then at the Bar), in Roux *v.* Salvador (1836), 3 Bing. N. C. 266, 270.

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of timber) was justified by the circumstances. "We are, therefore," says Montague Smith, J., in delivering judgment, "to say what is the legal effect of this sale so found (*m*) by the jury to have been right and necessary. We say that such sale supervening on the existing state of things was an actual total loss. A right sale passes the property; and when the property is passed from the assured by reason and in consequence of a peril insured against, the cargo is actually lost to him as much as if it was destroyed. We are aware that the interest of the underwriter may at times be sacrificed by a sale, where the ship or cargo might have been saved wholly or partially, if notice of abandonment had been given; but we are also aware that if a right sale, such as is here proved, is not held to be an actual total loss, it would be for the interest of the assured, where a notice of abandonment would make a constructive total loss, to give notice of abandonment and leave the ship or cargo to perish unsold; and so the benefit of salvage from a sale would be lost by reason of the delay required for notice of abandonment. . . . The opposing considerations for and against requiring notice of abandonment when the property insured exists in species are stated in Roux *v.* Salvador and Knight *v.* Faith (*n*) respectively. . . . The judgment in Knight *v.* Faith accords with Roux *v.* Salvador in holding that there may be a total loss without abandonment where there has been a right sale caused by urgent necessity, with full proof that everything was done *optimâ fide*, and for the real benefit of all concerned. There is an apparent difference of opinion in these two decisions as to the degree of imminent danger which should be held to be such urgent necessity as would justify a sale.

(*m*) This finding was set aside in the Exchequer Chamber. The case therefore is of no authority. But the judgment here cited, upon the assumption on which it proceeded, viz., the assumption of a "right sale," a sale forced upon all parties concerned by the perils insured against, is still of the highest authority, and is quoted with approval in Rankin *v.* Potter (1873), L. R. 6 H. L. at p. 102 (Brett, J.), and at p. 157 (Lord Chelmsford). Cf. also Cossman *v.* West (1887), 13 App. Cas. at p. 176.

(*n*) (1850), 15 Q. B. 649.

But the sufficiency of the degree of danger is within the province of the jury" (*o*). Sect. 1056.

1057. These observations of the Court appear to receive illustration from the case of Stringer *v.* English, &c. Insurance Company (*p*). That was a case of seizure by a United States cruiser, and of suit in the Prize Court of New Orleans. After many months there was judgment against the captors, and appeal from this judgment, and a sale of ship and cargo upon interlocutory order of the Court of Appeal, as a precautionary measure against deterioration; and whether this sale ought to have been prevented by the assured giving bail to the full value was the question on which depended his right, in the absence of an available notice of abandonment, to recover as for a total loss. The Court upon this question were of opinion that, considering the fluctuating value of American currency at the time, no prudent man would have given security to the full amount, and that the sale, therefore, not being the gratuitous act of the assured, was one of the direct and immediate consequences of the original seizure. "We come, therefore, to the conclusion of fact, that the assured could not by any means which he could reasonably be called on to adopt have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored in specie, and consequently entitled the assured to come upon the insurers for a total loss" (*q*). Stringer *v.* English Mar. Ins. Co.

The same position seems to have been assumed by Lord Tenterden in his summing-up to the jury in Doyle *v.* Dallas (*r*); and in the subsequent case of Gardner *v.* Salvador,

(*o*) Farnworth *v.* Hyde (1866), L. R. 2 C. P. 204; 34 L. J. C. P. 207, 210. For an account of Lord Campbell's decision in Knight *v.* Faith, see per Blackburn, J., in Rankin *v.* Potter (1873), L. R. 6 H. of L. (E. & I.) 83, 130, cited *post*, s. 1063.

(*p*) (1869), L. R. 4 Q. B. 676; in error, 5 Q. B. 599.

(*q*) *Per cur.* Stringer *v.* English, &c. Mar. Ins. Co. (1869), L. R. 4 Q. B. 676, 691, 692; on appeal, 5 Q. B. 599.

(*r*) 1 Mood. & Rob. at p. 54.

Sect. 1057. Bayley, J., said to the jury, "The question in this case is, whether you are satisfied there has been a total loss by the perils of the seas. I know of no such head in insurance law as loss by sale. If the situation of the ship be such that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the master, by means within his reach, can make an experiment to save it, with a fair hope of restoring it to the character of a ship (*i.e.*, a sea-going vessel), he cannot, by selling, turn it into a total loss. *Bona fides* in the master will not decide the question, for if he sells erroneously what is entitled to the character of a ship, though he thinks it a wreck, it will not do" (*s*).

Result of the cases.

1058. It appears, then, that the authorities support, or, at all events, are not inconsistent with, the position that, when a ship is justifiably sold by the master (*t*) under such circum-

(*s*) Gardner *v.* Salvador (1831), 1 Mood. & Rob. 116; in Tanner *v.* Bennett (1825), Ry. & Mood. 182; and also in Underwood *v.* Robertson (1814), 4 Camp. 138, where a total loss was claimed on sale of ship abroad, no notice of abandonment appears to have been given, and no objection made to the want of it.

(*t*) We have already advanced the view that no sale can be justifiable so as to affect the rights of underwriters, whether as to notice of abandonment or otherwise, unless it be made not only *bonâ fide* and prudently, but also under circumstances of necessity, and this passage in our text, which corresponds, though by no means literally, with a passage to be found on p. 1031 of the second edition, must be read subject to this qualification.

In the original passage, Arnould, after the words "sold by the master," added the words "or owner," maintaining that whether the sale was by the master or by the owner made no difference, and citing the cases of Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48; Allen *v.* Sugrue (1828), Dans. & Ll. 188; 8 B. & Cr. 561; and Idle *v.* Royal Exch. Ass. Co. (1819), 3 Moore, 148; 8 Taunt. 774. The proposition, however, laid down in this way may be open to misconception. It is only by reason of the emergency that underwriters will be bound. It is true that where a sale is effected by an owner present at the scene of emergency it will not have any the less a binding effect as against underwriters by reason merely of the emergency being grappled with by the owner, instead of by the master. To this extent Arnould was probably correct, and so far he is borne out by the authorities which he cites. But where the master is able to communicate with his owners at home, it would in ninety-nine cases out of a hundred be equally possible for the owners in their turn to communicate

stances that, though her timbers hold together, though she may not have lost the form of a ship, yet she has ceased to exist as a sea-going ship until she is repaired at a cost which would exceed her worth when so repaired, this is a case of absolute total loss on ship, for which the assured may recover without notice of abandonment. Sect. 1058.

We have already pointed out that it is now an indispensable pre-requisite to the exercise by the master of any power of sale, that he shall communicate with his owners whenever communication is, under the circumstances, practicable, and would not be attended with such delay as must prove seriously detrimental to the interests involved (*u*). Master should communicate with owners.

1059. In the case of Roux *v.* Salvador (*v*), Tindal, C. J., relying on previous authorities, especially the *nisi prius* decisions of Allwood *v.* Henckel (*x*) and Hodgson *v.* Blakiston (*y*), considered that so long as the subject of insurance remains in specie, the assured cannot recover for a total loss without notice of abandonment, even although the assured had by a sale parted with the property insured. The cases referred to, however, according to Arnould (*z*), only show that the mere fact of sale abroad, irrespective of the state of the ship or cargo which led to and justified it, does not constitute an absolute total loss. The doctrine that notice of abandonment is in all cases necessary where the property insured remains

with their underwriters, and in such cases it seems difficult to say that there could be any such emergency as to justify the owners in taking the matter into their own hands and selling without giving the underwriters an opportunity of deciding for themselves as to the best course to adopt. It is submitted that in all but the very rarest cases an owner at home, on receiving information from his captain as to the condition of his vessel, must, unless the vessel is then an actual wreck, give notice of abandonment if he wishes to recover a total loss. It is difficult, in these days of the telegraph and of modern facilities for communication, to conceive of circumstances so urgent as to relieve an owner from taking this course. The point was considered in the Court of Appeal in Kaltenbach *v.* Mackenzie (1878), L. R. 3 C. P. D. 467, where there are indications that such was the view of their Lordships.

(*u*) See *ante*, ss. 195, 201; Carver, Carriage, s. 316; Australian Steam Nav. Co. *v.* Morse (1872), L. R. 4 P. C. 222.

(*v*) (1836), 1 Bing. N. C. 539.

(*x*) 1 Park, Ins. 399.

(*y*) *Ibid.* 400, n.

(*z*) 2nd ed. p. 1032.

Sect. 1059. in specie was, however, overruled by the Exchequer Chamber in Roux *v.* Salvador itself, and since Rankin *v.* Potter (*a*) it is impossible to contend that the mere want of notice of abandonment will preclude the assured from recovering, where there is nothing which a notice of abandonment can pass to the underwriter.

Where ship subsists as a ship mere fact of sale will not convert a constructive into an absolute total loss.

The following cases, which in previous editions of this work have been cited to show that a notice of abandonment must always be given where the thing remains in specie, can only be accepted now as authorities for the position that where the sale is not justified, as between owner and underwriter, such sale will not convert a constructive into an absolute total loss, so as to entitle the owner to recover for a total loss without giving notice of abandonment. That is to say, where the ship, though much damaged, is still subsisting as a ship when the assured receives intelligence of the loss, he cannot, by electing to sell, instead of repairing her, on the probable estimate of the expenses of repair being greater than her repaired value, entitle himself to recover a total loss without notice of abandonment.

Martin *v.* Crokatt.

1060. Thus, in Martin *v.* Crokatt (*b*), a ship and cargo being insured from Carlscrona (in Sweden) to London, the ship, in the course of her voyage, became so sea-damaged that she was forced to run into Warburg, a small fishing place on the Swedish coast, where, on survey, she was reported incapable of proceeding on her voyage without thorough and very expensive repair. The assured, on hearing this, without giving any notice of abandonment, stated the facts to the underwriters, asking directions how to proceed; they declining to interfere, he ordered a sale of the ship and cargo (which latter was undamaged) for the benefit of all concerned:

(*a*) L. R. 6 H. L. 83. In Kaltenbach *v.* Mackenzie (1878), L. R. 3 C. P. D. 467, Brett, L. J., at p. 474, seems to express the opinion that where there has been a sale, notice of abandonment of the proceeds of sale must in all cases be given. This is an *obiter dictum*, and there appears to be no other authority for such a doctrine, which, it is submitted, cannot be supported.

(*b*) (1811), 14 East, 465.

they were accordingly sold on the spot, and realized so little, that, after deducting the expenses of the sale and salvage, a balance of 20*l.* was left against the assured: the assured on this, having brought his action for a total loss, Lord Ellenborough directed a nonsuit, on the ground that, as the ship continued to subsist in specie in the place whither she was carried, this was not a total loss without notice of abandonment. On motion for a new trial, the Court on the same ground refused the rule (*c*). Little stress seems to have been laid in this case upon the fact of the sale; and from the circumstances it is apparent that there can have been no necessity for the owner to have taken the matter out of the hands of the underwriters. And apart from such emergency, it was clearly a case for notice of abandonment, "in order," as Lord Ellenborough said, "to enable the underwriters to elect whether or not they will incur the expenses of repair." Sect. 1060.

A ship, bound from Hull to Quebec, was obliged by tempest to run into Limerick, which then had no docks fit for taking in or repairing a ship of her size. On survey, she appeared much damaged, and as the agent of the assured there conceived it to be impossible to remove her to any other port for repairs, they had her resurveyed, condemned, and broken up where she lay, as the best course for all concerned. No notice of abandonment having been given, it was held that the assured could not recover as for a total loss (*d*). Dallas, C. J., after admitting that there were cases in which the assured may claim a total loss without abandonment, added, "But if the case be doubtful, the assured ought not to take upon himself to determine for the underwriter, to break up the ship, and call upon them for a total loss. The ship is proved to have been in that condition, that it was necessary to have a survey. She was not a wreck; her timbers were together; she existed as a ship specifically, both when she Bell *v.* Nixon.

(*c*) Martin *v.* Crokatt (1811), 14 East, 465.

(*d*) Bell *v.* Nixon (1816), Holt, N. P. 423. The Court in banc were unanimous, that notice of abandonment was necessary in this case.

Sect. 1060. was surveyed and when she was sold (e). In this case, too, it is apparent that there was no necessity for the owner to sell; he should have given notice of abandonment to his underwriters, and left them to take their own course.

Kaltenbach v. Mackenzie. **1061.** The case of Kaltenbach *v.* Mackenzie (f) bears on the same principle. A vessel struck on a bank on the 22nd of January, 1871, while on the way to Hong Kong. She was taken back to Saigon, and on survey was reported to be a constructive total loss on the ground that the expense of her repairs would exceed her repaired value. On the 7th of February she was anchored in smooth water, and there was no evidence to show that she was in imminent danger of perishing, or that there was any immediate necessity for her sale. She was nevertheless sold by her owners by public auction shortly afterwards. No notice of abandonment was given, and there did not appear to be any reason why it should not have been given, except that the owner alleged that the underwriter, even if he had received such notice, could not have taken any other course than that adopted by the owners. On these facts the Court of Appeal held, reversing the decision of the Common Pleas Division, that the owners who claimed to recover for a total loss had been correctly non-suited by Lord Coleridge, C. J.

Fleming v. Smith. The case of Fleming *v.* Smith in the House of Lords may likewise be referred to here for the sake of the emphatic assertion, by Lord Campbell, of the necessity of an abandonment in cases like that before him, a case in which, as his Lordship expressed it, "the ship was not submerged or destroyed, but remained in the form of a ship capable of being repaired, and it was for the captain to determine whether it should be repaired or not.

"Under these circumstances the question arises whether, when the owners of a ship so insured receive intelligence that the ship is capable of being repaired, and that it is lying in

(e) Bell *v.* Nixon (1816), Holt, N. P. 423.
(f) (1878), 3 C. P. D. 467.

port, they can claim as for a total loss without giving notice of abandonment? My opinion is, they cannot do so" (*g*). Sect. 1061.

1062. The case of Knight *v.* Faith has often been cited as showing that even a justifiable sale consequent on a constructive total loss will not relieve an owner from giving notice of abandonment. The facts of this case were that a ship insured on time for 1,000*l.*, having stranded off the harbour of Santa Cruz, was beached there, unloaded, and surveyed. She was found to be so much damaged by the accident that the necessary repairs could not be done at Santa Cruz, there being no workmen, dockyard, or materials there; nor could she be taken to any port where she could prudently have been repaired. Knight *v.* Faith.

Shortly after the survey the master (who was also a part owner and interested in the policy) sold her for the benefit of whom it might concern: she fetched 72*l.* No notice of abandonment was given and a total loss claimed.

The Court, however, held that the sale by the master did not, under the circumstances, constitute an actual total loss, and therefore that, there having been no notice of abandonment, the assured could not recover as for a total loss (*h*). This decision, however, received severe criticism in the House of Lords in Rankin *v.* Potter (*i*), and can now only be supported on the ground that it does not appear to have been clearly shown that the sale was a justifiable sale as against the insurers. In Rankin *v.* Potter it was definitely decided by the House of Lords, affirming the doctrine of the Exchequer Chamber in Roux *v.* Salvador, that "notice of abandonment could not be in any case required, except where there was something which could be done by the underwriters in consequence." From this it follows that, inasmuch as when a ship is sold there is nothing to abandon to underwriters,

(*g*) Fleming *v.* Smith (1848), 1 H. L. Cas. 513, opinion of Lord Campbell, p. 535.

(*h*) Knight *v.* Faith (1850), 15 Q. B. 649.

(*i*) (1872), L. R. 6 H. L. 83.

Sect. 2182 [illegible] This case will be more particularly dealt with subsequently, but it may be well to say in this place at once that the opinion of Bramwell, L.J., seems to afford the best guide that we have to the true view.

1883 "The decision of the Court of Exchequer Chamber in Lord v. Sefton" was followed, [illegible] was in fact a case, turning upon general equitable principles. There was however one exception: Lord Campbell never could be brought to think it right. In the case of Thomas v. Smith, the counsel for the appellants, the late Mr. Serjeant Pearce and Mr. F. Thesiger argued, as I think, plainly from the decision in Lord v. Sefton, that notice of abandonment would not be in any case required, except where there was something which would be done by the underwriters in consequence, and that the failure to give notice of abandonment might be material as preventing the assured from treating the loss as total or not. This, as I have already stated, is what I consider to be the law. Lord Campbell was of a different opinion, and in his opinion says: 'The law therefore requires that notice shall be given in order to convert a constructive into a total loss.' Even though that was his opinion, it was not the judgment of the House of Lords. Lord Cottenham, Chancellor and Lord Brougham concurred in his opinion, carefully puts the decision exclusively on the ground that the assured had in fact elected to treat the loss as a partial loss only. This studied silence on his part may prevent us from saying that he differed from Lord Campbell; but he certainly did not express any concurrence with him.

Knight v. Faith.

"After this, in the Queen's Bench, when Lord Campbell was Chief Justice, there arose the case of Knight v. Faith (*j*).

(*j*) In Kaltenbach v. Mackenzie (1878), L. R. 3 C. P. D. at p. 474, Brett, L. J., suggests that even where there has been a sale there ought to be notice of abandonment, not indeed of the thing sold, but of the proceeds. But there is no other authority for this view.

(*k*) 1 H. L. Cas. 513.

(*l*) 15 Q. B. 649.

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The manner in which that judgment came to be delivered was very peculiar. There was a very brief case stated for the opinion of the Court of Queen's Bench. On the statements in which the Court came to the conclusion, as stated in the judgment, that 'slight repairs might have been sufficient again to fit the ship for navigation,' the Court said (*m*) that though the ship was sold, 'we are of opinion that as against the insurers such is not shown to be lawful.' On such facts the assured could never have recovered for a total loss, even if he had delivered all possible notices of abandonment from first to last. Yet the Court forced the counsel to amend the case by inserting a statement that no notice of abandonment was given; and pronounced an elaborate judgment on a point which it was wholly unnecessary to notice, except for the purpose of recording dissent from the decision of the Exchequer Chamber in Roux *v.* Salvador. It should in candour, however, be added that the other judges of the Court joined Lord Campbell in this. Still I think that the fact that a judgment was not necessary for the decision of the case before the Court always diminishes its authority. And I think that on perusing the judgment of Knight *v.* Faith it will be found that no argument is produced which had not been used in Roux *v.* Salvador, and that no new authority is produced except Lord Campbell's own opinions in Fleming *v.* Smith and a passage (*n*) from the judgment of Lord Chancellor Cottenham, in Stewart *v.* Greenock Marine Insurance." (*o*).

A ship arriving a wreck at her port of destination is clearly an absolute total loss.

1064. It is clear that if the ship reach her home port, or that of her destination, in so shattered and dismembered a state as to be no longer a ship, but a wreck, the assured may recover for a total loss without notice of abandonment. So too if she be wrecked in pieces off such port, so that nothing but her fragments come to hand, and the wreck will then be a salvage for the benefit of the underwriters. If, however, her planks still hold together, so that she retains the shape of

Shawe *v.* Felton.

(*m*) 15 Q. B. 657.
(*n*) 2 H. L. Cas. 159.
(*o*) L. R. 6 H. L. (E. & I.) 83, 129, 130, per Blackburn, J.

Sect. 1064. a ship, though wholly irreparable for the sea again, except at a cost greater than her value when repaired, the safer practice would appear to be to give notice of abandonment; if that be done the fact of her being brought thus disabled into her port of destination will make no difference to the right of the assured to claim a total loss. It was so held in Shawe *v.* Felton (*p*) and in Allen *v.* Sugrue (*q*); and the law as to this point is the same in the United States (*r*).

Effect of sale on notice of abandonment.

If the assured have given notice of abandonment and then orders a sale, this will not, it seems, operate as a waiver of his notice if that notice were justified by the existing facts, *e.g.*, if the ship is, as a ship, wholly irreparable except at a cost greater than her repaired value (*s*). At the same time it must be added that such a course on the part of the assured personally should only be followed under very exceptional circumstances.

Absolute total loss on sea-damaged goods when thrown away or sold in the course of the voyage.

1065. Almost all perishable goods are insured in this country "free of average," that is, with a stipulation on the part of the underwriter that, in respect of such articles, he will be liable for nothing short of a total loss.

Hence, a point that has very often arisen is, what, upon articles so insured, amounts to a total loss? Not that a total loss on articles so insured differs at all from a total loss on goods not so insured. As Lord Abinger says, "Whether a loss be total or partial in its nature must depend on general principles. The memorandum does not vary the rules upon which a loss shall be partial or total: it does no more than preclude the indemnity for an ascertained partial loss" (*t*).

(*p*) (1801), 2 East, 129.

(*q*) Allen *v.* Sugrue (1828), Dans. & Ll. 188; *S. C.* 8 B. & Cr. 561; 3 Man. & Ryl. 9. See, too, the case of Samuel *v.* Royal Exch. Ass. Co. (1828), 8 B. & Cr. 119; and also the case of the ship "Laurel" (Stewart *v.* Greenock Mar. Ins. Co. (1848), 2 H. L. Cas. 159); a case which, as Lord Truro remarks, "seems somewhat in advance of prior determinations." Per Lord Truro, 1 Macqueen, H. L. Cas. 339.

(*r*) Ralston *v.* Union Ins. Co. (1812), 4 Binney, 386. Cf. 2 Phillips, Ins. s. 1532.

(*s*) Allen *v.* Sugrue (1828), Dans. & Ll. 188.

(*t*) Per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 277, 278.

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The cases may be divided into two classes: 1. Where the loss has taken place in the course of the voyage, so that the goods never arrive at their destination. 2. Where the assured claims to recover on memorandum articles arriving in bulk sea-damaged.

Two classes of cases: 1. Where loss takes place in the course of the voyage. 2. Where the goods arrive at their port of destination sea-damaged.

1066. With regard to the former class of cases, to the consideration of which we shall for the present confine ourselves, the following is the rule established by our jurisprudence:—If perishable goods, by reason of sea-damage suffered in the course of the voyage, are necessarily unshipped at some intermediate port, and there found to be reduced, either to such a state of absolute putridity that they cannot with safety be reshipped into the same or any other vessel, and are consequently then and there thrown overboard; or to such a state of rapidly progressive decay that, instead of being reshipped and forwarded, they are necessarily sold at the intermediate port, from the certainty that, if sent on to their port of destination, their species itself would disappear, their form become changed, and their original character be entirely lost by decomposition before arriving there: in such cases there is an absolute total loss, within the meaning of the policy, on the goods so thrown away or sold. And even though at such forced termination of the risk (*i.e.*, at the time of the sale or throwing overboard) the goods may still have subsisted in specie, this will make no difference, the assured being entitled to recover the whole amount of the insurance without notice of abandonment, and the underwriters to the benefit of any salvage that may ultimately come to hand (*u*).

First class.

1067. The rule thus established is opposed to that laid down by Lord Mansfield in the case of Cocking *v.* Fraser, which applied the more rigorous construction that nothing short of going to the bottom of the sea (or, in his Lordship's own

This rule opposed to that of Cocking *v.* Fraser.

(*u*) Dyson *v.* Rowcroft (1803), 3 Bos. & Pull. 474; Cologan *v.* London Ass. Co. (1816), 5 M. & S. 447; Roux *v.* Salvador (1836), 3 Bing. N. C. 266; 4 Scott, 1.

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words, "absolute destruction of the goods by the wreck of the ship"), could amount to a total loss on articles insured "free of average," even at an intermediate port.

The facts of the case were as follows:—Fish was insured free of average from Newfoundland to the ship's port or ports of discharge in Portugal: the Portuguese port for which the cargo was destined was Figueira. The ship on her voyage encountered such bad weather that part of the fish was necessarily thrown overboard, and she was obliged, though bound for Figueira, to put into Lisbon, where, upon survey by the board of health of that city, the remainder of the fish was pronounced to be, and in fact was, rendered of no value through sea-damage. The ship did not proceed from Lisbon to Figueira in completion of her destined voyage, and the fish was not forwarded. Lord Mansfield, under these circumstances, held that the loss was not actually total, and that therefore the assured on fish could recover nothing (*x*). "What," said his Lordship, "is a total loss? A total loss of the thing insured is the absolute destruction of it by the wreck of the ship. The fish may all come to port, though, from the nature of the commodity, it may be putrid, it may be stinking, still, as the commodity specifically remains, the underwriter is discharged."

Cocking *v.* Fraser is overruled in English law.

It seems better to consider this case as overruled in English law than to endeavour to support it upon its facts (*y*), especially since the language of Lord Mansfield is so entirely unambiguous and so undoubtedly opposed to the rule now understood to prevail. It was, indeed, dissented from on three several occasions, by Lord Kenyon (*z*), Lord Alvanley (*a*),

(*x*) Cocking *v.* Fraser (1785), Park, 247; Marshall, 227; Benecke, Pr. of Indem. 270. See also the case reported, 4 Dougl. 295.

(*y*) Lord Alvanley conjectures that the words "of no value," in the case of Cocking *v.* Fraser, are somewhat too large, and that the fact was, not that the cargo was in such a situation as to make it impossible to preserve it, but was only so much damaged as not to be worth carrying on to the port of destination." See Dyson *v.* Rowcroft (1803), 3 B. & P. 476.

(*z*) In Burnett *v.* Kensington (1797), 7 T. R. 222.

(*a*) Dyson *v.* Rowcroft (1803), 3 B. & P. 475, 476.

and Lord Ellenborough (*b*); the latter of whom expressly said that, "if obliged to choose between the two, he should incline to the opinion of Lord Alvanley in Dyson *v.* Rowcroft in preference to that of Lord Mansfield in Cocking *v.* Fraser." Sect. 1067.

1068. In the United States the case of Cocking *v.* Fraser was for some time considered as establishing the law (*c*). Phillips, it is true, writing in 1854, considered that there was so much discrepancy in the decisions as to justify him in adopting the contrary view. Parsons, however, in 1868, declared it to be "well settled that, if the goods insured arrive at the port of destination existing in specie, the underwriters are not liable, although they are of no value whatever." And, similarly, as regards damaged cargo which does not arrive at the port of destination, but is sold at an intermediate port, he considers the true doctrine to be that, "if the article was in such a condition at the intermediate port that, by the exercise of reasonable diligence and care, it could be carried to the port of final destination so as to reach there in specie, although it might be worthless, the loss would be but partial, but otherwise if it would not arrive in specie." The authorities were reviewed in 1870 by the New York Commission of Appeals in the case of Wallerstein *v.* Columbian Insurance Co. (*d*), in which case the Court pronounced in favour of the view supported by Phillips and the more modern English decisions, and against the narrow doctrine laid down by Lord Mansfield in Cocking *v.* Fraser. Law in the United States.

1069. The following are some of the English cases which

(*b*) In Cologan *v.* London Ass. Co. (1816), 5 M. & S. 455. See, too, Asfar *v.* Blundell (1895), 1 Com. Cas. 71; 185 (C. A.); [1896] 1 Q. B. 123.

(*c*) 3 Kent, Com. 295. See also Saltus *v.* Ocean Ins. Co. (1817), 14 Johns. N. Y. 138; Mareau *v.* U. S. Ins. Co. (1814), 3 Wash. C. C. R. 256; Neilson *v.* Columbian Ins. Co. (1805), 3 Caines, 108; Phillips, s. 1767; Parsons, vol. ii. pp. 102—106.

(*d*) 44 N. Y. 204.

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illustrate the tendency to relax the extreme rigour of Lord Mansfield's rule:—

Rotten fruit.

A cargo of fruit insured "free of average" from Cadiz to Lisbon was, in consequence of tempestuous weather, necessarily carried into Santa Cruz an intermediate port, where it was found to be so much damaged by sea water that it had become rotten, and stunk to such a degree that it was necessarily thrown into the sea. The Court of Common Pleas held that the assured might recover for a total loss without giving notice of abandonment (*e*). Lord Alvanley said: "In this case it is found that the necessity" (for throwing the cargo overboard) "arose from sea water shipped during the course of the voyage, and that the commodity was in such a state that it could not be suffered to remain on board consistently with the health of the crew. In consequence of this necessity, therefore, the commodity was annihilated by being thrown overboard. Had it not been so annihilated, it would have been annihilated by putrefaction; and is it not as much lost to the insured by being thrown overboard as though the captain had waited till it arrived at complete putrefaction?"—"I never have understood that the underwriters insure fish and other articles against no perils which do not end in a total annihilation of the commodity" (*f*).

"Annihilation by putrefaction" is an absolute total loss.

Part of cargo of wheat thrown away as putrid at an intermediate port; *semble*, an absolute total loss of such part.

Cologan *v.* London Ass. Co., 5 M. & S. 447.

In the next case a cargo of wheat insured, "warranted free of average," from Quebec to Teneriffe was captured and recaptured, and carried by the recaptors into Bermuda, where, a scarcity prevailing, an embargo was put on the wheat. In order to repair the ship, the cargo was permitted to be unloaded, and the whole was accordingly landed, except about 600 bushels, which were found to be in such a state from the sea water that the magistrates, out of regard to the public health, ordered them to be thrown into the sea. As to this part of the case, the Court of King's Bench intimated a strong opinion (though, as notice of abandonment had in fact been given, the point did not directly arise for their decision) that

(*e*) Dyson *v.* Rowcroft (1803), 3 B. & P. 474. (*f*) *Ibid.*

there was an absolute total loss on the wheat thus thrown into the sea. Lord Ellenborough said: "Considering the contract of insurance as a contract of indemnity, it surely cannot be less a total loss because the commodity subsists in specie if it subsist only in the form of a nuisance. There is a total loss of the thing if by any of the perils insured against it is rendered of no use whatever, though it may not be entirely annihilated" (*g*). Sect. 1069.

1070. The case of Roux *v.* Salvador, which is now the leading authority on the subject in our jurisprudence, goes further, and shows that if the goods thus necessarily landed at an intermediate port in a sea-damaged state are sold in the market there, from the certainty that, if reshipped and sent on to their port of destination, they will inevitably perish before arriving there by the progress of putrefaction, which has already commenced and cannot be arrested by any means within the master's disposal; in such case the assured, who receives intelligence at one and the same time of the loss and the sale, may recover as for a total loss without notice of abandonment, although the goods at the time of sale still subsisted in specie and commanded a price in the markets of the intermediate port as and for what they were described as being in the policy, it being always understood that the proceeds of the sale, when they come to hand, are *pro tanto* a salvage for the benefit of the underwriters. Position established by Roux *v.* Salvador.

Hides valued at 1,117*l.* in the policy, and insured "free of average" from Valparaiso to Bordeaux, were necessarily landed in order to repair the ship, and were then found to be in a state of incipient putrefaction occasioned by moisture from a leak in the ship, being all, as it is termed, "greased," the hair coming off in the fingers of those who handled them. As this greasing is a partial fermentation, which could not be

(*g*) Cologan *v.* London Ass. Co. (1816), 5 M. & S. 447, 454, 455. This case, in so far as it may be considered an authority for the position that there can be a total loss of part of a cargo of memorandum articles shipped and insured in bulk, is now overruled by Ralli *v.* Janson (1856), 6 E. & B. 422; 25 L. J. Q. B. 300.

Sect. 1070. stopped by any means practicable at Rio, and as, in consequence of its progress, the hides would, by the progress of putrefaction, have lost the character of hides before they arrived at their destination, they were sold at Rio for the gross sum of 273*l.* as hides, for the purpose of being tanned, and were so tanned by the purchasers.

The ship was subsequently repaired, and proceeded to Bordeaux with the rest of her cargo; the assured, who had received at the same time notice of the loss and the sale, brought his action as for a total loss without having given notice of abandonment. The Court of Exchequer Chamber, reversing as to this point the judgment of the Court of Common Pleas, held that this was an absolute total loss, for which he was entitled to recover (*h*).

Grounds of decision.

1071. The principles upon which the Court of Exchequer Chamber proceeded in thus deciding are admirably stated by Lord Abinger in giving the judgment of the Court—a judgment which should be attentively studied by all who desire to know the present state of our law on this much litigated point. Without restating here what ought to be read at large in the report, it will be sufficient to say that the main point of decision was this—that, owing to the perils insured against, it had become impossible, when notice of loss was first received, for either the assured or the underwriter to procure the arrival of the hides according to the terms of the policy.

Judgment of Lord Abinger.

"In the case before us," said his Lordship, "the jury have found that the hides were so far damaged by the perils of the sea that they never could have arrived in the form of hides. By the process of fermentation and putrefaction which had commenced, a total destruction of them, before their arrival at their port of destination, became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit

(*h*) Roux *v.* Salvador (1836), 3 Bing. N. C. 266; 4 Scott, 1.

of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a constructive total loss, but of an absolute total loss, of the goods: they could never arrive; and, at the same moment when intelligence of the loss was received, all speculation was at an end." Sect. 1071.

His Lordship then enters into the question whether the fact of the goods, as in this case, subsisting in specie at the time of sale, and being in fact sold as hides, ought to make any difference as to the necessity of giving notice of abandonment; his Lordship decides that notice of abandonment is no more necessary in this case than it would have been "if, instead of being sold in specie, the hides had actually changed their form and been sold as glue, manure, or ashes" (*i*), in which case his Lordship assumes it as an undoubted point that no notice would be requisite (*k*).

In either case such sale, when, in the opinion of the jury, justified by necessity and a due regard to the interests of all parties, is made for the benefit of the party who is to sustain the loss; and the net amount thereof, after deducting the charges, becomes money had and received to the use of the underwriter, upon payment by him of a total loss.

Following the principle of this decision it was held by the Queen's Bench Division that where a cargo of coals, damaged by sea-water in the course of the voyage, was unloaded at a port of refuge, and, being found in a state that involved great danger of spontaneous combustion if again

(*i*) 3 Bing. N. C. 282.

(*k*) Thus answering in the negative a case put by Benecke: "Suppose fish valued at 100*l.* to sell for 1*l.* as manure: will this be a value so as to exonerate the underwriter?" Pr. of Indem. 379, not. Chancellor Kent answers the same case also in the negative, "for the cargo was of no value as fish, or in contemplation of the contract." Com. vol. iii. p. 296, n. (*a*).

Sect. 1071. put on board ship, was necessarily sold where it lay, there was a total loss within the policy without notice of abandonment (*l*).

No amount of damage will entitle the assured to put an end to the adventure and recover a total loss, without abandonment, unless such damage involves their total destruction in specie.

1072. It must, however, very carefully be borne in mind that no degree of loss in bulk, deterioration in quality, or depreciation in value, will entitle the assured to put an end to the adventure and recover a total loss (*m*), without notice of abandonment, on goods warranted free of average, unless such damage involves their total destruction in specie (*n*), either actual or inevitable. If the commodity can be forwarded to its port of destination with any reasonable prospect of arriving there in specie however damaged, the assured who has failed to send it on, or sold it at an intermediate port, cannot recover as for a total loss, at all events, without notice of abandonment.

Wheat, valued at 1,000*l.*, was insured, "free of average," from Waterford to Liverpool. The ship, on going down the river from Waterford, struck, and was run aground to prevent her sinking, in a place where her hull was completely under water at every high tide. About a month after the stranding the wheat was got out much damaged: one-third of it was thrown away as wholly useless; the other two-thirds were kiln-dried, and might have been sent on to Liverpool and sold there; instead of this, however, they were sold at Waterford for about 250*l.* gross, and 90*l.* net. Lord Ellenborough held that in this case the assured could not recover for a total loss on the wheat without notice of abandonment, because it

(*l*) Saunders *v.* Baring (1876), 34 L. T. N. S. 419.

(*m*) A constructive total loss might be recovered by giving proper notice of abandonment, if it could be shown that goods in their damaged state could not be forwarded, and that the cost of conditioning would exceed their value when conditioned.

(*n*) The expression "in specie" is to be understood in a business sense. Goods arriving in an unmerchantable condition are considered to have lost their species, although they may not have changed to anything else, and cannot be said to have ceased to exist. Asfar *v.* Blundell (1895), 1 Com. Cas. 71, 185 (C. A.); [1896] 1 Q. B. 123.

might have been sent on to its port of destination in a saleable state as wheat (*o*). Sect. 1072.

Tobacco and sugar were insured, "free of average," from Heligoland to London. Just off Heligoland the ship was wrecked, but the tobacco and sugar were got ashore there and saved, though in a very damaged state; the sugars having been mostly washed out of the hogsheads, and the tobacco (according to the statement of the plaintiff's counsel) entirely spoiled by sea-water, so as to be worth nothing at all to the assured. The Court of King's Bench unanimously held that the assured, although he had given notice of abandonment, could not recover for a total loss (*p*). Lord Abinger remarks on this case that "the tobacco and sugar, though damaged by the sea, was in the hands of the shippers at Heligoland; and, as stated by Lord Ellenborough in his judgment, for anything that appeared, might have been forwarded to their port of destination" (*q*). Lord Abinger probably spoke from recollection of what had been said by Lord Ellenborough in his own hearing, for nothing of the kind appears in the printed report, which is, however, very brief.

1073. Fifty-four hogsheads of sugar were insured, "free of average," from Gottenburg to Stralsund. At Copenhagen, in the course of the voyage, the ship was stranded and bilged. Every one of the fifty-four hogsheads was saved from the sea, and in every hogshead there were some loaves of sugar left, though the total quantity of sugar saved out of the whole fifty-four hogsheads was little more than enough to fill one: seventy of the loaves were saved dry. The jury found that this was not a total loss, obviously because a portion of the cargo was saved in a saleable state as sugar, and might as such have been sent on to its port of destination, and the Court of Common Pleas agreed with this finding (*r*).

(*o*) Anderson *v.* Royal Exch. Ass. Co. (1805), 7 East, 38.

(*p*) Thompson *v.* Royal Exch. Ass. Co. (1812), 16 East, 214.

(*q*) 3 Bing. N. C. 280.

(*r*) Hedburgh *v.* Pearson (1816), 7 Taunt. 154.

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The same principle was applied in the following case: Eighty-one bales of waste silk were insured, valued at 2,245*l.*, "free of average from Leghorn to Liverpool." The ship was compelled by stress of weather to put into Gibraltar for repairs, and her cargo was necessarily unloaded. Some of the bales were found to be much damaged by salt water, and were consequently sold at Gibraltar by the master, in the exercise of what the jury found to be a reasonable discretion and such as a prudent uninsured owner would have displayed, but not one of the bales was so damaged as to make its whole contents useless for any mercantile purpose. All the silk might, at a reasonable and moderate expense, have been put in a condition to be brought home by another vessel, and some of it was, in fact, brought home to England and sold as silk, though in a very deteriorated state; the Court of Common Pleas held that this was not a total loss, and consequently that the underwriters were not liable (*s*).

The underwriter is never liable, as for a total loss, on sea-damaged goods arriving in specie at their port of destination.

1074. So much for the liability of underwriters in respect of goods warranted "free of average" for a total loss by the perils insured against in the course of the voyage, *i.e.*, before the arrival of the goods at their place of destination. If, however, they do so arrive at their port of destination, Lord Abinger admits, and the following cases show, that "if they remain in specie (*t*), however damaged, there is not a total loss," and consequently the underwriter is exonerated.

Boyfield *v.* Brown overruled.

1. English authorities.

Lee, C. J., indeed, at Nisi Prius, before the introduction of the memorandum into English policies, seems to have held that where perishable goods arrived, but so damaged by the perils of the sea as to realize on sale less than the freight, this was a total loss (*u*). But this case must now be deemed to be overruled by the numerous cases in which the point has been otherwise determined, and uniformly in the same way.

(*s*) Navone *v.* Haddon (1850), 9 C. B. 30.

(*t*) As to the meaning, however, of "in specie," see Asfar *v.* Blundell, *infra*, s. 1076.

(*u*) Boyfield *v.* Brown (1737), 2 Str. 1065.

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1075. Thus, where fruit was insured, "free of average," from Lisbon to London, and arrived at the latter place so damaged by the perils insured against as to have lost 80 per cent. in value, Lord Kenyon held the underwriters not to be liable. "The cargo," said his Lordship, "arrives at its port of destination; and though it is good for very little, yet it has invariably been held that the voyage must either be lost, or the cargo, if it be one of those mentioned in the memorandum, be wholly or actually destroyed, to entitle the assured to recover" (*x*).

In this case it seems that the fruit, being neither physically destroyed nor totally extinguished in value, was still fruit and saleable as such, though at a very reduced price.

So where a cargo of peas, warranted free of average, reached its port of destination so damaged as to produce only one-fourth of the freight, which became due on their arrival, the defence set up was that if goods arrive in the market to which they are destined, then, though a loss equivalent to a total loss may have happened on them, the underwriters are not liable, and the jury accordingly, under the direction of Lord Mansfield, found for the defendant (*y*).

Here, again, the peas seem to have been sold as peas, and therefore were not totally extinguished, either in specie or in value.

1076. Rice was insured, "free from average," from Charleston to Liverpool; the ship after arriving within the limits of the port of Liverpool took the ground while endeavouring to get into the dock gates there, filled with water and became a wreck; the rice was taken out of her in small craft, as she lay, and sold in Liverpool for 972*l.*, the freight amounting to 1,762*l.* This was held not to amount to a total loss on the rice (*z*). Lord Ellenborough said: "I

(*x*) M'Andrews *v.* Vaughan (1793), 1 Park, 252.

(*y*) Mason *v.* Skurray (1780), 1 Park, Ins. 253; 1 Marshall, Ins. 218, 219.

(*z*) Glennie *v.* London Ass. Co. (1814), 2 M. & S. 371.

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think it quite clear that this is a case of particular average, and not of total loss. There has been an arrival of the ship with the goods at their destination—the voyage has been performed, and the goods have come into the hands of the consignees; it appears that the rice, which was said to be totally lost, did produce 972*l.*" (*a*). "Though damaged," as Lord Abinger observes, "it was delivered to the consignees, and in a saleable state as rice" (*b*).

Remarks of Lord Abinger.

Goods arriving in an unmerchantable condition are not considered to have arrived in specie.

The words lastly cited from Lord Abinger's observations are of importance. It is now established in England that goods which on arrival are unmerchantable, and incapable of being used for the purposes for which goods of their species are ordinarily used, are not considered to have arrived in specie, although they may be still recognizable and may not have lost their shape and outward appearance, and may not have changed to anything else. In Asfar *v.* Blundell the "Govino" was sunk in the Thames with a cargo of dates on board. The dates remained for three tides under water, and when recovered were found to be saturated with Thames water and sewage, and to have suffered from fermentation and putrefaction so as to be unfit for human food. They were, however, sold and exported for purposes of distillation, and were never unrecognizable as dates. Under these circumstances, Mathew, J., held that "the goods had not arrived in specie within the true meaning of the expression, or in such a condition as to entitle the carriers to freight. In my opinion the dates were lost. They were not merchantable or capable of being used as dates. They had become a mass of vegetable matter in a state of decomposition; their nature had been wholly changed. The suggestion of the defendants that total destruction of the dates was necessary to disentitle

(*a*) Glennie *v.* London Ass. Co. (1814), 2 M. & S. 376. The case of Buller *v.* Christie (1806) (insurance on 1,950 boxes of soap), cited in 2 M. & S. 374, is not law. See the English authorities here collected, and the United States case of Marean *v.* United States Ins. Co. (1814), 3 Wash. C. R. 250; 2 Phillips, Ins. s. 1768.

(*b*) In Roux *v.* Salvador (1836), 3 Bing. N. C. 280.

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the charterers to freight may derive some support from Cocking *v.* Fraser, but it is clearly not the law. The destruction of the merchantable character of the goods to the extent disclosed by the evidence is sufficient to take away the right to freight in accordance with the principle of the decisions in Dakin *v.* Oxley, Roux *v.* Salvador and Duthie *v.* Hilton" (*c*).

2. Law in the United States.

1077. Some of the earlier decisions of the American Courts, proceeding upon the general principle that nothing short of absolute destruction will make a total loss on memorandum articles, if they arrive at their port of destination, appear to have adopted the rule in Cocking *v.* Fraser in all its severity, and go beyond what is now accepted as the law of this country. Thus, where corn, insured "free of average," arrived in a putrid state at its port of destination, the Judge at Nisi Prius told the jury "that if it was so much damaged as to have become of no value for the nutriment of man," the underwriters were liable as for an actual total loss. But the Court in banc held this a misdirection, saying, "that so long as the corn physically existed there could not be a total loss on account of damage merely; although it was good for nothing, the insurers were not liable" (*d*). We have, however, already pointed out that the American decisions and opinions on this subject have been by no means uniform, and that in a more recent case the correctness of this decision has been impugned by high authority (*e*).

3. Law of France.

1078. In France, before the introduction of the Code de Commerce of 1807, when actual total loss (*perte entière*) was by the Ordonnance de la Marine made a ground of abandonment on perishable goods (*f*), the question was vehemently debated whether such a case of actual total loss could ever be said to arise when the goods arrived in specie at their port of

(*c*) Asfar *v.* Blundell (1895), 1 Com. Cas. 71; affirmed in C. A., *ibid.* 185; [1896] 1 Q. B. 123.

(*d*) Neilson *v.* Columbian Ins. Co. (1805), 3 Caines, 108, cited 2 Phillips, Ins. s. 1767.

(*e*) *Ante*, s. 1068. See Wallerstein *v.* Columbian Ins. Co. (1870), 44 N. Y. 204.

(*f*) Ord. de la Marine, tit. vi. des Ass. art. 46.

Sect. 1078. destination. Emerigon was decidedly of opinion that it could not. "I have already spoken," he says, "of the case in which a cargo of wheat arrives in port almost entirely rotten: I now add that, even if it arrive entirely so, that is not such a case of total loss as to justify an abandonment" (*g*). Valin (*h*) and Pothier (*i*) inclined to the less rigorous interpretation; and the latter even considered that the loss might be total within the meaning of the 46th Article of the Ordinance if the goods were damaged to half their value.

Opinion of Emerigon.

Of Valin and Pothier.

The French tribunals, before the Code de Commerce, appear invariably to have supported the more rigid construction of Emerigon, that there can be no total loss on perishable goods unless there has been an entire privation or absolute destruction of them in their nature and essence (*destruction totale des effets assurés dans leur nature et essence*) (*k*).

Result of the cases.

From a review of all these authorities it plainly appears that no degree of damage, however great, can amount to an absolute total loss on perishable goods warranted free of average, if they arrive in specie at their port of destination; in other words, the mere fact of their so arriving precludes all inquiry into the extent of the damage they have sustained, and entirely discharges the underwriter, who has stipulated by the memorandum to be exempt from liability for any loss on such goods which is not in its nature total.

Goods arriving in bulk, but so

1079. In this context a question was raised by Arnould (*l*) as to which it is conceived that there can now be no kind of doubt,

(*g*) Emerigon, c. xvii. s. 2, p. 214. M. Estrangin dissents from this opinion. "This doctrine," he says, "is at variance with what Emerigon himself has advanced a little before, viz., that a thing is destroyed when it has ceased to exist in specie." He adds, "if wheat has become manure it certainly can no longer be said to exist in specie." (Si le blé est devenu fumier il n'est certainement plus dans son essence.) Estrangin, note to Pothier, d'Assurance, 428.

(*h*) Comment. on Ord. tit. vi. art. 46, vol. ii. p. 342, ed. 1829.

(*i*) Pothier, d'Assurance, No. 121.

(*k*) See Estrangin's edition of Pothier, in Appendix, p. 419—429, ed. 1810.

(*l*) 2nd ed. p. 1054.

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damaged as no longer to preserve their original character, are an absolute total loss.

namely, whether, if the goods arrive at their port of destination, but not in specie, this will amount to an absolute total loss, so as to charge the underwriter, notwithstanding the memorandum. If the goods, or rather the remains of such goods, arrive at their port of destination in such a state that, in the language of Lord Abinger, "the species itself has disappeared, and the goods have assumed a new form, losing all their original character" (*m*)—if, in fact, they arrive, in the words of Lord Alvanley, "annihilated by putrefaction" (*n*)—may not, asked Arnould, the loss on such goods be considered total, notwithstanding their arrival? It is an absolute total loss for which the underwriter is liable, notwithstanding the memorandum, if I sell my hides at Rio Janeiro from the certainty that, if sent on to Bordeaux, they will arrive there a mere mass of putrefaction; if, instead of selling I send them on, and they do arrive at Bordeaux a mere mass of putrefaction, surely their so arriving cannot prevent the loss from being actually total, so as to exempt the underwriter from his liability. That of which I insure the arrival is a cargo of hides; that which actually comes to port in the case supposed is a heap of corruption, which cannot properly be designated as hides nor be sold as such; the actual thing, then, whose arrival I insured has not come to port: it is physically destroyed—"annihilated by putrefaction." Is the loss less an actual total loss because the remains of the thing insured have not been thrown overboard or burnt before arrival?

1080. Such, indeed, seems to have been the view of Lord Ellenborough, who said (*o*): "It surely cannot be less a total loss because the commodity subsists in specie, if it subsist only in the form of a nuisance. There is a total loss of the thing if, by any of the perils insured against, it is rendered of no use whatever, although it may not be entirely

(*m*) 3 Bing. N. C. at p. 279.
(*n*) 3 Bos. & Pull. 474.
(*o*) In Cologan *v.* London Ass. Co. (1816), 5 M. & S. at p. 455.

Sect. 1080. annihilated." But Arnould (*p*), while admitting that these reasonings seemed, theoretically speaking, to be unanswerable, nevertheless considered it to be better in practice to disregard all such refinements, and to lay down the broad position that there can be no total loss on perishable goods, and therefore no claim whatever against the underwriter, who by the memorandum has expressly confined his liability to the case of their total loss only, unless the goods either go to the bottom of the sea, or are necessarily destroyed or justifiably sold by the assured, from the impossibility of sending them on in specie to their port of destination.

Arnould's view.

The present editors, however, submit that the law of this country is in accord with the unanswerable reasonings of Arnould, rather than with his view as to what should be the practice. As regards ship, it is clear that an arrival in port after loss of species is regarded as no arrival at all, and it is difficult to see why a different rule should be applied to the case of goods. And an arrival after loss of species appears to be an even stronger case of total loss than a sale before loss of species. Phillips (*q*), while agreeing with Arnould that the question whether an article retains its identity is often very perplexing and of a subtle and metaphysical character, nevertheless clearly regards loss of species as constituting in all cases, both as regards ship and goods, a total loss. And, in view of the cases of which Asfar *v.* Blundell (*r*) is an example, Arnould's position appears now to be quite untenable.

Modern French law.

1081. It was, no doubt, in order to avoid such subtleties as have been above indicated, that the Legislature of France, on introducing the Code de Commerce of 1807, altered that clause in the Ordonnance de la Marine which made "actual total loss" (*perte entière*) a ground of abandonment on perishable goods, and substituted instead thereof the words "loss or deterioration of the commodities insured when such deterioration or loss amounts to three-fourths" (*s*).

(*p*) 2nd ed. p. 1055.

(*q*) s. 1605.

(*r*) (1895), 1 Com. Cas. 71, 185 (C.A.); [1896] 1 Q. B. 123, *ante*, s. 1076.

(*s*) Art. 369. "Perte ou détérioration des effets assurés si la détériora-

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Remarks of M. Becane on this change of the law.

M. Becane, an editor of Valin, writing in 1828, *i.e.*, more than twenty years after the code became the law of France, thus speaks of the change introduced by it in this respect: "Nothing can be more just than such a regulation; a deterioration so considerable is equivalent to a total loss; and, but for this rule, as an actual total loss (*perte entière*) can hardly occur except in cases of shipwreck, the underwriters might frequently have raised difficulties which the law has wisely put an end to by a safe and definite rule" (*t*).

With regard to memorandum articles it is expressly provided by the Code de Commerce (*u*), "that the clause 'free of average' shall discharge the underwriters from all average loss, whether general or particular, except in cases which give a right of abandonment; and in such cases the assured may choose whether he will abandon or proceed for an average loss."

As damage to the goods in quantity or quality to the extent of three-fourths in measure, weight or value is, as we have seen, one of the express grounds of abandonment, it follows that the assured may, by the present law of France upon abandonment, recover for a total loss on memorandum articles as well as upon any others, whenever the loss or deterioration reaches the required amount.

Absolute total loss of part of the cargo. Principle established by Ralli *v.* Janson.

1082. It is now settled, after considerable fluctuation in the authorities, that "where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and although such package or packages be entirely destroyed or otherwise lost by the specified perils" (*x*).

tion ou perte va au moins à trois quarts."

(*t*) Valin, Comment. sur Ord. ed. par M. Becane, 1828, vol. ii. p. 339.

(*u*) Code de Commerce, art. 409.

(*x*) Judgment of the Court of Error

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Three modes of insuring memorandum articles.

There are three cases frequently occurring in practice touching the insurance of memorandum articles:—1. Where a cargo or a quantity of memorandum articles of the same species is shipped in bulk, valued in bulk, and insured in bulk. 2. Where it is shipped in separate packages, but not expressed in the policy by distinct valuation or otherwise to be separately insured. 3. Where, being shipped in separate packages, it is expressed by distinct valuation or otherwise to be separately insured.

Cargo shipped and insured in bulk.

1083. As to the first case it is clear that there can be no total loss on part of a cargo so shipped and insured. In Hills *v.* The London Assurance Company a cargo of wheat, valued at 1,600*l.* and warranted free of average, was shipped in bulk and insured in bulk by one entire insurance. A quantity of the wheat to the value of about 70*l.* was pumped up out of the hold into the sea during a storm and totally lost. This was held not to be an actual total loss of part of the wheat, but only an average loss on the whole, for which the underwriters were not liable (*y*).

Cargo shipped in separate packages, but not separately insured.

1084. The next case was for a long time doubtful, but was at length disposed of by the judgment of the Court of Error in Ralli *v.* Janson. In that case an insurance was effected by two policies on 2,688 bags of linseed, valued at 1,600*l.* (*z*), "free of average," for a voyage from Calcutta to London. The ship on the voyage met with a hurricane and was driven into the Cape of Good Hope, where 1,023 bags were found to be in such a state from sea-damage that a large portion of the linseed was at once thrown into the sea as rotten and worth-

in Ralli *v.* Janson (1856), 6 E. & B. 422; 25 L. J. Q. B. 300, overruling Davy *v.* Milford (1812), 15 East, 559, on this point, and the dicta of Abbott, J., and Holroyd, J., in Cologan *v.* London Ins. Co. (1816), 5 M. & S. 456.

(*y*) Hills *v.* London Ass. Co. (1840), 5 M. & W. 569.

(*z*) The indorsement on the first policy was "per Waban, 2,688 bags linseed, 1,600*l.*;" and on the second, "per Waban, linseed, 1,600*l.*" It was also stated in the case, though not, as it would appear, very material, "that all the bags were of the same size and contained the same quantity."

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less, and the rest was then and there sold and only realized a few shillings, and if sent on in the vessel would have lost the character of linseed before arriving in England. The remaining 1,165 bags (*a*) were brought sound to England. The question was, whether on the 1,023 bags the assured were entitled to recover, notwithstanding the memorandum, as for a total loss of part of the cargo. It was held that they were not (*b*).

Doctrine in the United States.

In the United States the law is the same as that thus laid down by the Exchequer Chamber: namely, that "the underwriter is not liable for any partial loss on memorandum articles unless there is a total loss of the whole of the particular species, whether the particular article is shipped in bulk, or in separate boxes or packages" (*c*).

Separate packages separately insured.

1085. The third case is where a cargo is made up of separate packages, capable of distinct valuation in the outset, and the insurance appears, from the terms of the policy, to be separately effected on each distinct package; in such cases there can be little doubt that the loss will be treated as a total loss on each package lost (*d*).

Clauses frequently inserted to show that the insurance is to be distributively taken.

In practice, accordingly, as we have seen elsewhere, clauses are inserted in almost all policies upon perishable cargoes composed of separate packages, which have the effect of showing that the insurance is to be thus distributively taken: for instance, "to pay average on each package as if separately insured"; or "to pay average on each species as if separately insured" (*e*).

Entwistle *v.* Ellis.

A singular attempt to vary a policy in this particular, by means of the subsequent declaration of ship and value, was properly defeated in the Court of Exchequer. It was a policy "on any kind of goods and merchandise in any ship

(*a*) Five hundred had been jettisoned in the hurricane.

(*b*) Ralli *v.* Janson (1856), 6 E. & B. 422; 25 L. J. Q. B. 300.

(*c*) Wadsworth *v.* Pacific Ins. Co. (1829), 4 Wend. 33; and Humfrey *v.* Union Ins. Co. (1824), 3 Mason, 429; 2 Phillips, Ins. s. 1773.

(*d*) Per Lord Abinger in Hills *v.* London Ass. Co. (1840), 5 M. & W. 576.

(*e*) Stevens, Av. 224.

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or ships," "to be valued on rice to be declared, warranted free from particular average, unless," &c. Afterwards the policy was indorsed with this declaration: "(R) 500 bags rice per 'Laidmans,' at 8*s.* 3*d.* per bag. 206*l.* 5*s.*"; and as there was a partial loss, though not under circumstances to suspend the warranty free from average, it was contended that the assured was nevertheless entitled to recover as for a total loss of part under this indorsement. The Court, however, gave judgment for the underwriter, holding that the intention of the policy to exclude any right to recover for an average loss could not be varied by a subsequent declaration, which by that intention was to be confined to a statement of ship, mark, and value: Bramwell, B., at the same time expressing a doubt whether this declaration, in the form in which it appeared, could have had the effect contended for (*f*).

General insurance on several separate articles wholly distinct in their nature.

1086. A fourth case has arisen in our Courts; one, namely, in which the insurance is general, but on several separate articles wholly distinct in their nature. The master of the "Lion" had insured 100*l.* on his effects on board, "free of average," from Italy to England. The ship having taken fire, the master succeeded in saving his chronometer and other things; the rest, to the value of 67*l.* 10*s.*, was burnt, and the ship and cargo entirely destroyed. The master claimed as for a total loss of part, and the Court of Common Pleas allowed the claim, on the ground that whereas in Ralli *v.* Janson the article insured was of one species, linseed, here the articles insured were each of a distinct and different character from the others; and, therefore, if there was a total loss of any one article, the plaintiff was entitled to recover on it. If not, it would lead to this startling result, that a man who saved the clothes he was wearing would not be able to recover for the loss of his other property (*g*). Similarly the same Court soon afterwards decided in favour of the assured under

(*f*) Entwistle *v.* Ellis (1857), 2 H. & N. 549; 27 L. J. Ex. 105.

(*g*) Duff *v.* Mackenzie (1857), 3 C. B. (N. S.) 16; 26 L. J. C. P. 313.

a policy on "any goods," where a miscellaneous equipment of an emigrant was partially lost (*h*). Sect. 1086.

Absolute total loss on freight. General principles.

1087. An insurance on freight is, as we have already seen, nothing more than an undertaking that, if the shipowner is prevented from earning freight by any of the perils insured against, the underwriters on freight will make good, to the extent of their subscriptions, the loss he has thereby sustained (*i*).

To the inquiry, then, as to what constitutes an absolute total loss on freight, it may in general be answered that, whenever the happening of the event, on which the earning of freight depends, is rendered absolutely impossible, or in any practical sense utterly hopeless, by means of the perils insured against, this is a case of absolute total loss. The question, therefore, turns in some measure on the nature of the contract under which freight is payable. If the freight insured be the hire of a ship for an entire voyage, payable under the terms of a charter-party only on condition of the arrival of that particular ship at the port of destination, and such arrival be rendered impossible or hopeless, either by her foundering at sea, or being justifiably sold as irreparable in the course of the voyage, this ought, on principle, to be an absolute total loss on freight, quite irrespective of all questions as to the state of the cargo. Where, on the other hand, the earning of the freight insured is not thus made to depend on the arrival of the ship under the charter-party, but on the delivery of the goods according to the terms of the bill of lading, the chance of the ship's arrival would seem to be less important as the criterion of the right to recover a total loss on freight without notice of abandonment, than the chance that the goods may be forwarded so as to earn freight by another ship (*k*). In such cases, accordingly, if, although the original ship be wholly destroyed or

(*h*) Wilkinson *v.* Hyde (1858), 3 C. B. (N. S.) 30; 27 L. J. C. P. 116.

(*i*) Atty *v.* Lindo (1805), 1 B. & P. N. R. 240, per Mansfield, C. J.

(*k*) Shipton *v.* Thornton (1838), 9 A. & E. 314.

Sect. 1087. justifiably sold as irreparable, yet the cargo is preserved in such a state that it may be sent on so as to earn freight by a substituted ship, it should seem that the assured, in order to recover as for a total loss on freight, ought, on principle, to give notice of abandonment (*l*).

Transhipment under the policy.

1088. Instead, however, of giving notice of abandonment, the assured may prefer to send on the goods by another vessel to the port of destination, and so fulfil his contract; and if he do so, he may then come against the insurers under the "sue and labour" clause for the whole expense of transhipping and sending on the cargo, including the freight of the substituted vessel, as being the expense of preventing a loss of the whole of the freight which would otherwise have fallen upon the insurer (*m*).

It is not intended to attempt to classify the various ways in which an absolute total loss of freight may arise. It is clear, however, that it may be the result of loss of ship or loss of cargo, or loss of both. And such loss, whether of ship or of cargo, may amount to a total loss, actual or constructive, or may merely consist of partial damage or detention, provided that the freight is thereby prevented from being earned (*n*). For example, if the ship with a full cargo on board has foundered at sea, so that ship and cargo are both hopelessly lost to the assured without any assignable chance of salvage, this is a clear case of absolute total loss on the freight, the earning of which has become impossible under the circumstances. So where the freight insured is the hire of a ship under charter-party, the same consequence follows if the ship is lost by perils insured against after the assured has acquired an insurable interest (*o*).

Foundering of chartered ship.

(*l*) See Rankin *v.* Potter (1873), L. R. 6 H. L. at p. 103. The rules of Freight Insurance Clubs very frequently provide that there shall necessarily be deemed to be a total loss of freight in all cases of actual or constructive total loss of a vessel entered in the Association.

(*m*) Kidston *v.* Empire Mar. Ins. Co. (1866), L. R. 1 C. P. 535.

(*n*) See, generally, the opinion of Brett, J., in Rankin *v.* Potter (1873), L. R. 6 H. L. 83.

(*o*) Thompson *v.* Taylor (1795), 6

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Of general ship.

1089. So, even where the freight insured is to become payable on delivery of the goods by a general ship under the terms of the bill of lading, although a full cargo may not be actually on board at the time of loss, yet, if a full cargo have been then contracted for, in this case also the assured on freight may recover as for a total loss, though only a part, or even though none, of the cargo may actually be on board the ship at the time of loss (*p*); if, on the other hand, in such case the full intended cargo be neither shipped on board nor contracted for at the time of loss, there cannot be an absolute total loss of the freight on a full cargo, but only of the freight in respect of which the assured has acquired an insurable interest (*q*).

Absolute total loss of part of freight, by loss of part of cargo.

Capture of ship and cargo, the loss continuing total till action brought.

On the same principle, if the event, on which the earning of the entire freight is made to depend under the charter-party, be the ship's arrival at her port of ultimate destination with a certain description of cargo, and the happening of this event is rendered hopeless by the capture of the ship (unredeemed by subsequent restoration) before this particular description of cargo is loaded on board, this is a clear case of absolute total loss on the whole freight (*r*).

Seizure and sale of outward cargo.

So where, under a policy on ship and freight for a Baltic risk, it appeared that the ship was a general ship, and the freight insured was made payable on delivery of the cargo at the ship's port or ports of discharge in the Baltic, it was held that seizure, condemnation, and sale of this cargo under the Berlin decree in the ship's port of discharge, involved an absolute total loss of the outward freight, though the ship, which had been also seized, was repurchased by the master, and ultimately arrived earning homeward freight (*s*); had the

T. R. 478; Horncastle *v.* Suart (1806), 7 East, 400; Mackenzie *v.* Shedden (1810), 2 Camp. 431.

(*p*) Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519, where all the previous authorities are cited.

(*q*) See the discussion on insurable interest in freight, *ante*, Pt. 1, ch. xii.

(*r*) Atty *v.* Lindo (1805), 1 Bos. & Pull. N. R. 236.

(*s*) Wilson *v.* Forster (1815), 6 Taunt. 25; 1 Marshall, 425; *S. P.* in United States, Hurtin *v.* Union Ins. Co. (1806), 1 Washington, C. C. R. 530.

Sect. 1089. Other cases.

policy in this case been on freight for the homeward voyage under charter-party, then, although the cargo first shipped on board at the foreign port had been taken out and sold, yet, if the ship had ultimately arrived at her home port so as to earn freight with another cargo, this would not have been a total loss on freight under such policy (*t*).

There may also be an absolute total loss of freight where sea perils prevent the ship from loading the agreed cargo, except after such a delay as would frustrate the commercial objects of the affreightment, whereby the contract becomes inapplicable (*u*).

On the same principle, where the event on which the earning of freight is made to depend under the charter-party is the ship's completing in safety her entire voyage out and home, then, if the ship be lost on the homeward passage, there will be an absolute total loss on the whole freight; if, on the other hand, the voyage out is distinct from the voyage home, and freight have been earned on the ship's arrival outwards, her subsequent loss on the homeward passage is not an absolute total loss of the whole freight (*x*).

Other cases of total loss of freight, and, in particular, those in which ship and cargo, or either of them, have been sold abroad by the master, will be more conveniently considered under the head of Constructive Total Loss on Freight.

No notice of abandonment is required under a policy on profits.

1090. In a policy on the profit of goods, the underwriter engages that the goods shall not be prevented by the perils insured against from so arriving as to earn a profit: if,

(*t*) Everth *v.* Smith (1814), 2 M. & S. 278; Brockelbank *v.* Sugrue (1831), 1 Mood. & Rob. 102; see also Barclay *v.* Stirling (1816), 5 M. & S. 6.

(*u*) Jackson *v.* Union Mar. Ins. Co. (1873), L. R. 8 C. P. 572; 10 C. P. 125; In re Jamieson and The Newcastle Assn., [1895] 2 Q. B. 90. The case is different where the freight is lost owing to the exercise by the charterers of special rights reserved to them by the charter-party by which they are under particular circumstances excused from loading. See Inman *v.* Bischoff (1882), 7 A. C. 670; Mercantile Ship Co. *v.* Tyser (1881), 7 Q. B. D. 73. This subject is dealt with more fully in Chapter I. of Part III.

(*x*) Mackrell *v.* Simond, 2 Chitty, R. 660 (cases in time of Lord Mansfield).

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then, the goods are so prevented from arriving by the perils insured against, there is a total loss on the expected profits, and this without any necessity for a notice of abandonment.

Nor under a policy on commission.

Commissions stand upon the same footing as profits. Hence, if the goods are prevented from arriving by perils insured against, the assured may recover for a total loss: and as the assured in such case could assign nothing by abandonment, no notice of abandonment is required.

CHAPTER VII.

CONSTRUCTIVE TOTAL LOSS.

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General doctrine of constructive total loss.

1091. A CONSTRUCTIVE total loss is as much a total loss within the meaning of a policy of insurance as an actual total loss (*a*).

Definition.

A constructive total loss in Insurance Law is that which entitles the assured to claim the whole amount of the insurance, on giving due notice of abandonment. Generally speaking, that is a case of constructive total loss where the thing insured has been reduced to such a state, or placed in

(*a*) Adams *v.* McKenzie (1863), 13 C. B. (N. S.) 442; and cf. Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] App. Cas. at p. 610. Policies on bottomry are an exception; Thompson *v.* Royal Exch. Ass. Co. (1813), 1 M. & S. 29; Broomfield *v.* Southern Ins. Co. (1870), L. R. 5 Ex. 192.

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such a position, by the perils insured against, as to make its total destruction or annihilation, though not inevitable, yet highly imminent, or its ultimate arrival under the terms of the policy, though not utterly hopeless, yet exceedingly doubtful. For instance, though the thing insured may not be absolutely destroyed or irretrievably lost, yet, in the language of Lord Abinger: "There may be a capture, which, though *primâ facie* a total loss, may be followed by a recapture which would revest the property in the assured. There may be a forcible detention, which may either speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination (*b*). There may be some other peril which renders the ship innavigable, without any reasonable hope of repair; or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination" (*c*).

Notice of abandonment.

In all such cases, the assured, if he wishes to recover for a total loss, must, as a necessary preliminary to so doing, give due notice of abandonment: that is, an explicit (*d*) intimation to the underwriter that he offers to cede or abandon to them unconditionally (*e*) his whole interest (*f*) in the thing insured, or the remains of it, as far as it is covered by the policy; and this notice he must give in reasonable time (*g*).

Reasons why notice is necessary.

1092. For this rule there are two grounds: "When the

(*b*) "In matters of business," says Maule, J., "a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost." Per Maule, J., in Moss *v.* Smith (1850), 9 C. B. 103.

(*c*) 3 Bing. N. C. 286. The parties may, of course, define "constructive total loss" for themselves. Thus it is not an uncommon club rule that if any ship insured has been stranded or sunk, and remained in such position for a given period, and during such period it has been found impracticable to save her, the ship shall be held to be a constructive total loss. As to the construction of such a rule, see Sunderland S.S. Co. *v.* North of England, &c. Association (1894), 11 T. L. R. 106; Rowland's S.S. Co. *v.* Mar. Ins. Co. Ld. (1901), 6 Com. Cas. 160.

(*d*) Thellusson *v.* Fletcher (1780), 1 Esp. 72; Parmeter *v.* Todhunter (1808), 1 Camp. 591.

(*e*) See *post*, s. 1188.

(*f*) *Post*, s. 1185.

(*g*) As to what is reasonable time, see *post*, s. 1192.

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assured has once elected to treat the loss as a total loss, the underwriters can insist upon his abiding by the election, so as to enable them to take the benefit of any advantage which may arise from the thing insured. Therefore the object of notice is, that he may tell the underwriters at once what he has done, and not keep it secret in his mind, to see if there will be a change of circumstances. There is another reason: the thing in various ways may be profitably dealt with. Therefore the second reason for requiring notice of abandonment to be given to the underwriters is, that they may do, if they think fit, what in their opinion is best, and make the most they can out of that which is abandoned to them" (*h*).

Assured may always elect to treat the loss as partial.

The assured may, on the other hand, however serious the damage may have been, refrain from giving notice of abandonment, and treat the loss as partial. Thus, in the case of The Bawnmore, the vessel was insured against marine risks in one policy, and against fire only in another. She sustained injuries by stranding which were not sufficiently serious to constitute an actual total loss, but so serious that the cost of repairing her would have exceeded her repaired value. Thirty-six hours afterwards, no notice of abandonment having meanwhile been given, she was completely destroyed by fire. The underwriters on the fire policy, which was valued, were sued for a total loss, but contended that, a total loss having been occasioned by the stranding, no second total loss could be sustained during the same voyage. But it was held that the loss by the stranding was, in the absence of a notice of abandonment, only a partial loss, and, however serious this might have been, it was no answer to the plaintiff's claim to recover for a total loss by the fire (*i*).

(*h*) Per Cotton, L. J., in Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. at p. 480.

(*i*) Woodside *v.* Globe Mar. Ins. Co., [1896] 1 Q. B. 105. See also Lohre *v.* Aitchison (1877—1879), 2 Q. B. D. 501; 3 Q. B. D. 538; 4 App. Cas. 755; Pitman *v.* Universal Mar. Ins. Co. (1882), 9 Q. B. D. at p. 208; Mellish *v.* Andrews (1812), 15 East, 16, per Lord Ellenborough. Cf. The St. John's (1900), 101 F. 469.

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Conditions of recovering as for a total loss.

After giving notice of abandonment, the right of the assured to recover as for a total loss depends, in English law, upon the point whether the state of things which entitled him thus to give notice of abandonment continued down to the time of bringing the action (*k*). In our law, therefore, there are two main questions to be considered in every case of constructive total loss: 1. Was the state of things such as, *primâ facie*, to entitle the assured, on receiving intelligence thereof, to give notice of abandonment? 2. Did it continue such down to the time of action brought, as to entitle him to follow up such notice and recover as for a total loss?

Upon what intelligence the assured may give notice of abandonment.

1093. The first question then is, upon what kind of intelligence the assured may give notice of abandonment. As to this, it may be answered generally that he has, *primâ facie*, a right to give such notice on receiving intelligence of any such marine casualties as those just referred to, which, though they do not involve the absolute destruction or irretrievable loss of the thing insured, yet render its destruction highly probable or its ultimate recovery very doubtful. These are the only kind of casualties which can justify a notice of abandonment. No amount of damage, however great, which does not threaten the entire destruction of the thing insured (*l*); no amount of difficulty in regaining possession of it, which does not involve an absolute temporary privation of ownership, or alienation of property (*m*), can make a case of constructive total loss. "The assured cannot elect to turn what, at the time when it happened, was only an average loss, into a total one by abandoning" (*n*). "There is no

(*k*) It is doubtful whether the test is the same in Scottish law: Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] App. Cas. 593. The Court of Session had in an earlier case decided that nothing happening subsequently to a notice of abandonment could affect a constructive total loss; Smith *v.* Robertson (1809), 2 Dow, 474.

(*l*) Casalet *v.* St. Barbe (1786), 1 T. R. 187; Furneaux *v.* Bradley (1780), 1 Park, 365.

(*m*) Thorneley *v.* Hebson (1819), 2 B. & Ald. 513.

(*n*) Per Lord Mansfield in 2 Burr. 697.

Sect. 1093. instance," says Buller, J., "where the owner can abandon, unless at some period of the voyage there has been a (constructive) total loss" (*o*). "There is not any principle," says Lord Ellenborough, "which authorizes abandonment, unless where the loss has been actually total, or in the highest degree probable, at the time of the abandonment" (*p*).

Notice may be given immediately if report is probable.

1094. Supposing, however, the case be such as *primâ facie* to justify the assured in giving notice of abandonment, he is not bound, before giving it, to wait for full and accurate information, but may give it at once upon mere report, provided he act *bonâ fide* and such report is sufficiently probable (*q*).

"In cases like this," said Lord Ellenborough, "men must act upon probable information, and leave the effect of their acts to be determined by the eventual truth or falsehood of the intelligence they receive. If I hear of my ship being taken in the East or West Indies, I am not obliged to wait till I certainly know the event, by the testimony of those who were present. Provided the thing has once existed, what I do, believing it to have taken place, must be valid and effectual" (*q*).

If made on false intelligence.

Of course, if it turns out that the intelligence upon which the assured acted, in giving notice of abandonment, was totally false and unfounded, the notice of abandonment is entirely inoperative—in fact, is a mere nullity (*r*). The effect of an offer of abandonment, according to Lord Ellenborough,

(*o*) 1 T. R. 191. The learned Judge uses the term "total loss" without qualification, but the whole tenor and language of his judgment shows that he was speaking of a constructive total loss.

(*p*) Per Lord Ellenborough in Anderson *v.* Wallis (1813), 2 M. & S. 240.

(*q*) Bainbridge *v.* Neilson (1808), 1 Camp. 240. In the United States a report in a newspaper has been held a sufficient foundation for notice of abandonment. Boseley *v.* Chesapeake Ins. Co., 3 Gill & Johnson (1831), 450. See 2 Phillips, s. 1666.

(*r*) Le délaissement fait par erreur ne produit aucun effet, lorsque l'erreur tombe sur quelqu'une de ces choses, qu'il faut connaître pour opérer un abandon régulier et valable, comme si la nouvelle de l'accident se trouvait fausse. 2 Emerigon, c. xvii. s. 6, p. 233.

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is that, if it appears to have been properly made upon supposed facts, which turn out to be true, the assured has put himself in a condition to insist on his abandonment. But it is not enough that it was made properly on assumed facts, if it turn out that none such existed; it may be said to be properly made upon notice received, and *bonâ fide* credited by the assured, of his ship having been wrecked, whether such intelligence were true or not, and although the letter conveying it turned out to be a forgery; yet clearly no right of action would vest in him, founded upon an abandonment made on false intelligence. If the facts be all imaginary or founded on misconception, the whole foundation of the abandonment fails (*s*).

Notice must be justified by the facts as they exist at the time it is given.

1095. And in order to make a notice of abandonment valid, not only must the information on which it is founded prove true, but it must also be justified by the state of facts existing at the time when it is actually given. Even though the facts upon which it was founded were truly reported, and were in themselves such as to justify the assured in giving notice of abandonment, yet, if they have ceased to exist before the time at which such notice was given, it will have no force or effect whatever. Thus where the assured, on hearing of the capture of his ship, gave notice of abandonment, but the ship had been in fact recaptured, though not to his knowledge, before such notice was given, the Court held that it was entirely inoperative, for an abandonment could be made only according to the facts at the time of making it (*t*). Lord Ellenborough said that to give effect to such a notice of abandonment would grievously enlarge the responsibility of the underwriters; it would be to make them answerable, not for the actual loss, but for a supposed total loss which had in fact ceased to exist (*u*).

(*s*) Bainbridge *v.* Neilson (1808), 10 East, at p. 341.

(*t*) Bainbridge *v.* Neilson (1808), 10 East, 329; Parsons *v.* Scott (1810), 2 Taunt. 363; Falkner *v.* Ritchie (1814), 2 M. & S. 290.

(*u*) 10 East, 341.

Sect. 1095. The law in the United States, and also in France, is in this respect the same with our own (*x*).

And by the facts as they exist at the time of action brought.

1096. But even though the intelligence may have been true, and the state of things at the time the notice was given such as to justify its being given (*i.e.*, though the loss may have continued constructively total at the time the assured gave notice of abandonment), yet the undoubted doctrine of the English law is, that the right of the assured, after having given such notice, to recover as for a total loss, depends entirely on the state of things as it exists at the time of action brought. If before the commencement of the action the thing insured be restored, under such circumstances and in such a state that the assured may, if he pleases, take possession of it, and may reasonably be expected so to do, this defeats his right to recover as for a total loss (*y*). Lord Tenterden thus states the law as now understood in this country: "The abandonment is to be viewed with regard to the ultimate state of facts as appearing before the action brought, according to the opinion of the Court in Bainbridge *v.* Neilson. Doubts were expressed as to the propriety of that decision by very high authority (Lord Eldon) in Smith *v.* Robertson (*z*); but, notwithstanding those doubts, the rule as laid down in Bainbridge *v.* Neilson was adopted in the two subsequent cases of Patterson *v.* Ritchie (*a*), and Brotherston *v.* Barber (*b*). We consider the point to have been well settled, and the rule established by these authorities" (*c*).

(*x*) 2 Phillips, Ins. s. 1662; 3 Pardessus, Droit Com. 233.

(*y*) See the cases cited in ss. 1099—1102. Bainbridge *v.* Neilson (1808), 10 East, 329; Patterson *v.* Ritchie (1815), 4 M. & S. 393; Brotherston *v.* Barber (1816), 5 M. & S. 418; Naylor *v.* Taylor (1829), 9 B. & Cr. 718.

(*z*) (1814), 2 Dow, 474.

(*a*) (1815), 4 M. & S. 393.

(*b*) (1816), 5 M. & S. 418.

(*c*) Per Lord Tenterden in 9 B. & Cr. 718. Cf. Shepherd *v.* Henderson (1881), 7 App. Cas. 49, per Lord Blackburn; Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] App. Cas. 593; Ruys *v.* Royal Exch. Ass. Co., [1897] 2 Q. B. 135. It may, perhaps, still be open to doubt whether the doctrine that the state of affairs at the time of action brought must be looked to applies, except in cases of capture and the like. See per

Sect. 1097.

The law of France and the United States differs from our own on this point.

1097. This doctrine of the English law differs from that of the Continent and of the United States. In France the law is now fixed by the Code de Commerce, which declares (*d*) that no abandonment can operate as an irrevocable transfer of property, unless it be, 1, accepted; or, 2, adjudged to be valid. Boulay-Paty thus explains the meaning and effect of this provision of the Code:—"An acceptance by the underwriter waives any defect in the grounds of the abandonment;" the judgment of the Court decides that good grounds existed for it at the time it was made. If before the abandonment is thus "adjudged to be valid" the thing insured should be restored, the right of the assured to insist on his abandonment is not thereby defeated; for the judgment, when given, has a retrospective effect, and, if it be in favour of the validity of the abandonment, the underwriters are presumed to have acquired the proprietorship of the thing insured, from the moment the abandonment was first notified to them (*e*).

By the existing law of France, then, 1. An abandonment once well made on good grounds is indefeasible, whether it have been accepted or not; 2. If accepted, it is indefeasible, whether it have been made on good grounds or not.

The law as thus explained prevails also in the United States of America. The facts, as they exist at the time a notice of abandonment is given, must be such as to justify it; but if they be so, then the rule is that "an abandonment once rightfully made is binding and conclusive between the parties, and the rights flowing from it become vested rights, and are not to be divested by any subsequent events" (*f*).

Lord Halsbury, [1898] App. Cas. at p. 599. In America, an abandonment once rightfully made is conclusive; 2 Phillips, s. 1705. So, too, generally on the Continent. The foreign rule is preferred by Mr. Carver (see Paper read before the Buffalo Conference of the International Law Association—Clowes & Sons, 1900).

(*d*) Art. 385.

(*e*) 4 Boulay-Paty, Droit Com. 377. See also 3 Pardessus, Droit Com. 424.

(*f*) Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, Circuit R. 27; 3 Kent, 324; 2 Phillips, s. 1705; and see per Lord Halsbury in Sailing Ship "Blairmore" Co., Ltd. *v.* Macredie, [1898] App. Cas. 593.

Sect. 1068. **1068.** Thus a distinction exists in this country, which is not to be met with elsewhere, between the state of facts which will entitle the assured to give notice of abandonment, and those which will entitle him, after having given such notice, to insist upon it and recover as for a total loss (*g*). A notice of abandonment in our law may or may not operate as an abandonment in fact, according to the ultimate situation of the property intended to be abandoned; and it must therefore be carefully distinguished from an abandonment, as that word is employed generally by the American and Continental jurists, in the sense of a virtual and irrevocable transfer of all the abandoned property, quite irrespective of its subsequent restoration.

The doctrine of constructive total loss varies, as applied to the different subjects of insurance.

If, from the general doctrine of constructive total loss, we pass to an examination of the cases, we shall find some apparent confusion in the decisions, arising principally from a want of properly distinguishing the different effects of the doctrine of constructive total loss, as applied to the different subjects of insurance. In order to avoid, as far as possible, this confusion, we will consider separately the cases of constructive total loss on the three main subjects of insurance—Ships, Goods and Freight.

The difficulty, it will be seen, relates not so much to the grounds of abandonment in the abstract, *i.e.*, to the kind of casualties which give the right to abandon (*h*), as to the application of general principles to the varying circumstances of each particular case, which must be the apology for a more lengthened citation of authorities than would be requisite under a more scientific and methodical system of law.

(*g*) See per Le Blanc, J., in Bainbridge *v.* Neilson (1808), 10 East, 345.

(*h*) The grounds of abandonment (*i.e.*, cases of constructive total loss) contained in the following enumeration taken from the Code de Commerce, are all, excepting the last, admitted to be such in our law:—1. Capture; 2. Shipwreck; 3. Stranding, where the ship's timbers are broken (*échouement avec bris*); 4. Innavigability, produced by perils of the seas; 5. Detention by a foreign power; 6. Or by the home government; 7. Loss or deterioration when amounting to three-fourths of the value of the thing insured.

Sect. 1099.

Constructive total loss on ship—in cases of capture, arrest, seizure, desertion at sea, &c.

1099. The best general statement of the circumstances which confer on the assured on ship a *primâ facie* right to give notice of abandonment is contained in the following passage from the judgment of Story, J., in the American case of Peele *v.* The Merchants' Insurance Company (*i*): "The right of abandonment has been admitted to exist where there is a forcible dispossession or ouster of the owners of the ship, as in cases of capture, &c.; where there is a restraint or detention which deprives the owner of the free use of his ship, as in cases of embargoes, blockades, and arrests; where there is a present total loss of the physical possession and use of the ship, as in cases of submersion; where there is a total loss of the ship for the voyage, as in cases of shipwreck, so that the ship cannot be repaired in the port where the disaster happens; where the injury is so extensive, that by the reason of it the ship is useless, and the making repairs would exceed her value."

Capture, *primâ facie*, confers the right of giving immediate notice of abandonment.

We will consider the different cases somewhat in the above order. Firstly, therefore, the assured on the ship has a right to give notice of abandonment immediately he hears that his ship has been forcibly taken out of his possession and control by capture; for from the moment of capture he is deprived of the free disposal of his vessel—at all events for a time, and perhaps for ever (*k*). "The ship," as Lord Mansfield says, "is lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy" (*l*). Immediately, therefore, the assured receives intelligence that his ship is captured, he has a right to give notice of abandonment; and he may insist on such notice, and recover as for a total loss, "provided the capture, and the total loss occasioned thereby, continue to the time of bringing the action" (*m*).

But restoration before action determines the right.

If, however, before action brought, the ship be recaptured and restored to the possession or control of her owners, either in an undamaged or only partially damaged state, the assured

(*i*) (1822), 3 Mason, R. 27, cited 2 Phillips, s. 1519.

(*k*) 2 Emerigon, 212.

(*l*) In 2 Burr. 694.

(*m*) Per Lord Mansfield in Hamilton *v.* Mendes (1761), 2 Burr. 1212.

Sect. 1099. cannot insist on his notice of abandonment and recover as for a total loss, even though the loss was total at the time he gave such notice (*n*).

The principle of the English law in fact is, as we have already seen, "that the nature of the damnification at the time of action brought is the sole criterion of the right to recover as for a total loss" (*o*).

Hamilton *v.* Mendes.

1100. The following case affords an illustration of this principle:—

Insurance was effected on ship and goods on a voyage from Virginia to London. The ship on the voyage was captured on the 6th of May, and recaptured on the 23rd; on the 3rd of June she was brought into Plymouth. Twenty days after her arrival in Plymouth, the assured, who then first heard both of the capture and recapture, gave notice of abandonment, which the underwriters refused to accept. On the 19th of August (before action brought) the ship and cargo were brought into the port of London. The ship had received no damage from the capture, and the cargo was delivered to the freighters, who paid full freight. Lord Mansfield held that upon the above facts the assured could not recover as for a total loss (*p*). "The plaintiff's demand," said his Lordship, "is for an indemnity. His action, then, must be founded on the nature of his damnification as it really was at the time of action brought. It is repugnant on a contract of indemnity to recover as for a total loss when the final event has determined that the damnification is in truth an average loss" (*q*).

Even where the notice was warranted by the supposed state of facts.

In this case, it will be observed, the assured was aware of the ship's recapture and restoration at the time he gave notice of abandonment, so that neither the supposed nor the real state of facts was such as to justify the notice of abandonment at

(*n*) See cases cited in Ruys *v.* Royal Exch. Ass. Co., [1897] 2 Q. B. 135.

(*o*) Per Lord Ellenborough in 4 M. & S. 583. See, however, Lord Halsbury's limitation on this principle in Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] App. Cas. 593.

(*p*) Hamilton *v.* Mendes (1761), 2 Burr. 1198.

(*q*) 2 Burr. 1210.

the time it was made; but even though the supposed state of facts was such as to justify the notice when given—that is, although the assured had at that time only heard of the capture and not of the recapture—yet the subsequent recapture and restoration of the ship in a comparatively undamaged state, if before action brought, will equally prevent the assured from recovering as for a total loss (*r*). Sect. 1100.

1101. The following are the facts of the case by which this point was first established:—

Bainbridge *v.* Neilson.

Insurance was effected on ship and freight for a homeward voyage from Jamaica to Liverpool; the ship, in the course of the voyage, was captured on the 21st of September, and recaptured on the 25th. The assured on the 30th, having then only received intelligence of the capture, but not of the recapture, gave notice of abandonment, which the underwriters did not accept. Afterwards, but before action brought, the ship was restored to the possession of the assured in an Irish port to which she had been carried; and after the commencement of the action, but before the trial, she arrived at Liverpool and earned freight. Neither ship nor goods were damaged, but the salvage charges on the ship amounted to about 15*l.* per cent. on the sum insured, and on the freight to about 13*l.* per cent. Lord Ellenborough and the Court of King's Bench, upon this state of facts and on the principle above stated, unanimously held that the assured could only recover for an average loss (*s*).

Or by the real state of facts.

1102. Subsequently the Courts, notwithstanding the doubts of Lord Eldon in Smith *v.* Robertson (*t*), gave a still further extension to the doctrine, and conclusively established that even where the real state of facts was such as to justify an abandonment at the time of giving notice, yet subsequent

(*r*) Bainbridge *v.* Neilson (1801), 10 East, 329; Parsons *v.* Scott (1810), 2 Taunt. 362; Naylor *v.* Taylor (1829), 9 B. & Cr. 718.

(*s*) Bainbridge *v.* Neilson (1801), 10 East, 329; see also *S. P.*, Naylor *v.* Taylor (1829), 9 B. & Cr. 718; 4 M. & Ryl. 526; *S. C.* at N. P., Dans. & Ll. 240.

(*t*) (1814) 2 Dow, 474.

Sect. 1102. Patterson v. Ritchie.

restoration before action brought would defeat the claim for a total loss (*u*). In the earliest case, goods insured for a voyage from Liverpool to Quebec were captured with the ship on the 27th September, and not recaptured till the 27th October; in the interim, on the 13th of October, the assured, who then first heard of the capture, gave notice of abandonment, which the underwriters refused to accept. Ultimately, and before action brought, the ship, with the goods on board, arrived at Quebec and earned freight. The Court held, on the above principle, that the assured could only recover for an average loss, to the extent of the sea-damage and salvage charges on the goods (*x*).

Effect of restoration may be nullified by the condition of the ship.

1103. But as capture, though *primâ facie* a total loss, does not necessarily amount thereto, so neither does recapture or restoration of the ship before action brought necessarily prevent the loss from being total. If the ship after the recapture comes to the hands of the owner, and remains at the time of bringing the action in such a state that, even if no notice of abandonment had been previously given, yet the assured might at that moment have abandoned, he may recover as for a total loss, notwithstanding the existence of her mere hull.

As far as concerns the ship, therefore, the question in all cases of capture (or other forcible privation), followed by restoration before action brought, comes to this: was the state of the ship after restoration, and at the time of commencing the action, such that the assured might at that time

(*u*) Patterson *v.* Ritchie (1815), 4 M. & S. 393; Brotherston *v.* Barber (1816), 5 M. & S. 418, confirmed in Naylor *v.* Taylor (1829), 9 B. & Cr. 724; see also Ruys *v.* Royal Exch. Ass. Co., [1897] 2 Q. B. 135, where the earlier cases on this subject are all reviewed by Collins, J.

(*x*) Patterson *v.* Ritchie (1815), 4 M. & S. 393; and see the passage from Lord Tenterden's judgment in Naylor *v.* Taylor (1829), 9 B. & Cr. 724, already cited, approving and confirming the rule of Bainbridge *v.* Neilson. In Brotherston *v.* Barber, Bayley, J., seemed even to think it an open point whether the assured could recover as for a total loss, "if the loss, continuing total at time of action brought, became a partial loss only at the time of the trial." 5 M. & S. 424. As to this, see Ruys *v.* Royal Exch. Corp., [1897] 2 Q. B. 135.

have treated the case as one of constructive total loss? If so, then he is entitled, notwithstanding such restoration, either to follow up a previous notice of abandonment, or, if he hears of the loss and restoration at one and the same time, then first to give one, and in either case to recover as for a total loss. Sect. 1103.

1104. The main difficulty has arisen in determining for that purpose in what state the restored ship must be. Lord Mansfield, in the decision of this point, gave great weight to a circumstance which, it is now settled, must be altogether left out of consideration in determining whether the loss on the ship is or is not constructively total—viz., whether, in consequence of the casualty, there had or had not been a loss of the voyage (*y*). That is a phrase of very pertinent meaning in relation to wager policies, which were no other than wagers in the form of policies on the issue or success of the voyage (*z*). In Pole *v.* Fitzgerald, a case upon an interest policy, this point was raised, and Willes, C. J., delivering the judgment of the Court of Error, then for the first time laid it down that in all policies on ship (not being wagers) the insurance is not on the voyage, but on the ship for the voyage, and that in all cases of loss under such policy the question never is, what damage has the assured sustained by the interruption of the voyage?—but, how much damage is done Loss of the voyage.

(*y*) Cf. Hamilton *v.* Mendes (1761), 2 Burr. 1209. "It does not necessarily follow that because there is a recapture, therefore the loss ceases to be total. *If the voyage is absolutely lost or not worth pursuing*—if the salvage is very high—if further expense is necessary—if the insurer will not engage, in all events, to bear that expense, though it should exceed the value or fail of success;—under these and many other like circumstances the assured may disentangle himself and abandon, notwithstanding there has been a recapture."

(*z*) Depaba *v.* Ludlow (1721), Comyn, R. 360; Pond *v.* King (1747), 1 Wils. 191; Dean *v.* Dicker (1746), 2 Str. 250; Whitehead *v.* Bance (1749), 1 Park, Ins. 165. The cases of Assieviedo *v.* Cambridge (1712), 10 Mod. 77, and Spencer *v.* Franco, before Lord Hardwicke, 1736, seem *contra;* but the former was never decided, and the latter turned mainly on another point. See these cases commented on by Lord Mansfield, 2 Burr. 695.

Sect. 1104. to the ship? This decision was affirmed in the House of Lords (*a*), but Lord Mansfield, notwithstanding, adhered through a long series of decisions to the loss of the voyage as a test of the loss of the ship (*b*). Through the whole time that he presided in the King's Bench, and indeed long afterwards, this seems to have continued to be the recognized doctrine of the Courts (*c*). One of the first cases in which there was a return to the doctrine of the House of Lords in Fitzgerald *v.* Pole was that of Parsons *v.* Scott (*d*), which came before the Court of Common Pleas in 1810; and four years afterwards the case of Falkner *v.* Ritchie was decided in the same way by the Court of King's Bench, then presided over by Lord Ellenborough (*e*). From this period, the law on the point may be considered as settled. The loss of the voyage has nothing to do with the loss of the ship (*f*).

The same principle has received abundant judicial illustration, and may be regarded as conclusively established, in the insurance law of the United States (*g*).

Under what circumstances will restoration nullify a notice of abandonment?

1105. But although it is thus established that loss of voyage has nothing to do with loss of ship, it is equally certain that the mere restitution of the ship's hull before action brought is not, *per se*, sufficient to defeat a notice of

(*a*) Pole *v.* Fitzgerald (1752), Willes, 641; affirmed in the House of Lords. See *S. C.*, Fitzgerald *v.* Pole, 5 Brown, P. C. 131.

(*b*) Goss *v.* Withers (1758), 2 Burr. 683; Hamilton *v.* Mendes (1761), *ibid.* 1198; Milles *v.* Fletcher (1779), 1 Dougl. 231*a*.

(*c*) See Cazalet *v.* St. Barbe (1786), 1 T. R. 187, in which Buller, J., says, "If either the ship or the voyage be lost, that is a total loss." So again in Rotch *v.* Edie (1795), 6 T. R. 413 (*temp.* Lord Kenyon), in a case of abandonment on detention, the same doctrine was held, viz., that it was a total loss on ship, because the voyage was lost, and the whole adventure frustrated.

(*d*) Parsons *v.* Scott (1810), 2 Taunt. 363.

(*e*) Falkner *v.* Ritchie (1814), 2 M. & S. 290; and by Lord Eldon in Brown *v.* Smith (1813), 1 Dow, P. C. 349; by Lord Tenterden in Doyle *v.* Dallas (1831), 1 Mood. & Rob. 55.

(*f*) See Naylor *v.* Taylor (1829), in Danson & Ll., and note, 248, 254.

(*g*) Bradlie *v.* Maryland Ins. Co. (1838), 12 Peters, S. C. R. 400; Hurtin *v.* Phœnix Ins. Co. (1806), 1 Washington, C. C. R. 400; Alexander *v.* Baltimore Ins. Co. (1808), 4 Cranch, S. C. R. 370; 2 Phillips, Ins. ss. 1521, 1522, 1523.

abandonment once rightfully made, and reduce a total to an average loss. "No cases say that the bare restitution of the hull of the ship prevents the loss from being total" (*h*). "The ship, after the recapture, must be *in esse* in the country of the owner under such circumstances that he may, if he pleases, take possession of her, and may reasonably be expected to do so" (*i*). Sect. 1105.

M'Iver *v.* Henderson.

A ship, insured from Liverpool to the African coast, was captured by the French, who, after taking out her captain and most of her crew, and plundering her guns, stores, furniture, provisions and register, gave her up in that state to the master of a Portuguese prize which they had previously taken, and at the same time put on board of her again the English captain and part of the original crew. The ship being left at sea thus manned and very badly provisioned, the Portuguese captain bore up for Fayal (Western Islands), and, on arriving there, claimed the ship and what remained of the cargo, as a gift from the French captors. The English captain resisted this claim and the Prize Court of Fayal decided in his favour, subject to an appeal, pending which, by selling what remained of the cargo and depositing the proceeds to abide the event of the appeal, he obtained the release of the ship and arrived with her at Liverpool before action brought. The ship, as she lay at Liverpool, was still in an entirely dismantled condition, but was worth to be sold as she lay 1,300*l.* (her value in the policy was 3,000*l.*). The expenses of bringing her from Fayal had been 221*l.*; the sum left there to abide the event of the appeal was 427*l.*; the appeal was still pending, and, in the event of its being decided against the assured, he would have lost his deposit and been condemned besides in damages to a much larger and indefinite amount. Under these circumstances the assured, who had given notice of abandonment on first

(*h*) Lord Mansfield in Milles *v.* Fletcher (1779), 1 Dougl. 232.

(*i*) Bayley, J., in Holdsworth *v.* Wise (1828), 7 B. & Cr. 799; afterwards per Lord Campbell in Lozano *v.* Janson (1859), 28 L. J. Q. B. 343; 2 E. & E. 100; and in Dean *v.* Hornby (1854), 3 E. & B. 190.

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1098. Thus a distinction exists in this country, which is not to be met with elsewhere, between the state of facts which will entitle the assured to give notice of abandonment, and those which will entitle him, after having given such notice, to insist upon it and recover as for a total loss (*g*). A notice of abandonment in our law may or may not operate as an abandonment in fact, according to the ultimate situation of the property intended to be abandoned; and it must therefore be carefully distinguished from an abandonment, as that word is employed generally by the American and Continental jurists, in the sense of a virtual and irrevocable transfer of all the abandoned property, quite irrespective of its subsequent restoration.

The doctrine of constructive total loss varies, as applied to the different subjects of insurance.

If, from the general doctrine of constructive total loss, we pass to an examination of the cases, we shall find some apparent confusion in the decisions, arising principally from a want of properly distinguishing the different effects of the doctrine of constructive total loss, as applied to the different subjects of insurance. In order to avoid, as far as possible, this confusion, we will consider separately the cases of constructive total loss on the three main subjects of insurance—Ships, Goods and Freight.

The difficulty, it will be seen, relates not so much to the grounds of abandonment in the abstract, *i.e.*, to the kind of casualties which give the right to abandon (*h*), as to the application of general principles to the varying circumstances of each particular case, which must be the apology for a more lengthened citation of authorities than would be requisite under a more scientific and methodical system of law.

(*g*) See per Le Blanc, J., in Bainbridge *v.* Neilson (1808), 10 East, 345.

(*h*) The grounds of abandonment (*i.e.*, cases of constructive total loss) contained in the following enumeration taken from the Code de Commerce, are all, excepting the last, admitted to be such in our law:—1. Capture; 2. Shipwreck; 3. Stranding, where the ship's timbers are broken (*échouement avec bris*); 4. Innavigability, produced by perils of the seas; 5. Detention by a foreign power; 6. Or by the home government; 7. Loss or deterioration when amounting to three-fourths of the value of the thing insured.

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Constructive total loss on ship—in cases of capture, arrest, seizure, desertion at sea, &c.

1099. The best general statement of the circumstances which confer on the assured on ship a *primâ facie* right to give notice of abandonment is contained in the following passage from the judgment of Story, J., in the American case of Peele *v.* The Merchants' Insurance Company (*i*): "The right of abandonment has been admitted to exist where there is a forcible dispossession or ouster of the owners of the ship, as in cases of capture, &c.; where there is a restraint or detention which deprives the owner of the free use of his ship, as in cases of embargoes, blockades, and arrests; where there is a present total loss of the physical possession and use of the ship, as in cases of submersion; where there is a total loss of the ship for the voyage, as in cases of shipwreck, so that the ship cannot be repaired in the port where the disaster happens; where the injury is so extensive, that by the reason of it the ship is useless, and the making repairs would exceed her value."

Capture, *primâ facie*, confers the right of giving immediate notice of abandonment.

We will consider the different cases somewhat in the above order. Firstly, therefore, the assured on the ship has a right to give notice of abandonment immediately he hears that his ship has been forcibly taken out of his possession and control by capture; for from the moment of capture he is deprived of the free disposal of his vessel—at all events for a time, and perhaps for ever (*k*). "The ship," as Lord Mansfield says, "is lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy" (*l*). Immediately, therefore, the assured receives intelligence that his ship is captured, he has a right to give notice of abandonment; and he may insist on such notice, and recover as for a total loss, "provided the capture, and the total loss occasioned thereby, continue to the time of bringing the action" (*m*).

But restoration before action determines the right.

If, however, before action brought, the ship be recaptured and restored to the possession or control of her owners, either in an undamaged or only partially damaged state, the assured

(*i*) (1822), 3 Mason, R. 27, cited 2 Phillips, s. 1519.

(*k*) 2 Emerigon, 212.

(*l*) In 2 Burr. 694.

(*m*) Per Lord Mansfield in Hamilton *v.* Mendes (1761), 2 Burr. 1212.

Sect. 1106. In this case it is important to observe that the repairs abroad for which his ship was bottomried had been done by strangers, without the authority of the assured. Had they been done by his direction, or by the master acting as his agent at the foreign port, then the fact of the ship's arrival would, as it seems, have precluded a recovery for a total loss, though the amount of the bottomry bond and expenses had together exceeded the worth of the ship to her owners as restored (*o*).

There must have been a total deprivation in order to justify a notice of abandonment.

1107. It must, however, be carefully borne in mind that in order to give the assured even a *primâ facie* right to abandon in respect of capture, seizure, desertion, or other privation of property or possession, whether forcible or not, there must have been, at some one period of time during the risk, a total loss by the complete and actual privation of the owner's possession or control over the ship. If the legal possession of the ship by the owner have never been put an end to by the casualty in respect of which he abandons, he can never recover as for a total loss.

The ship "William," of New York, insured in this country for a voyage from Hull to New York, met with such tempestuous weather, and became so leaky, that the crew, exhausted by working the pumps, deserted her at sea as the only possible means of saving their lives, and were taken on board the brig "Hyder Ali." At the same time eight men of the "Hyder Ali's" crew were allowed to board the "William" in the hopes of ultimately bringing her into port and earning salvage. The "Hyder Ali" reached New York in safety, and the owners of the "William," who resided there, immediately sent orders to their agents in England to give notice of abandonment to the underwriters, which was given accord-

case of capture, recapture and sale abroad by the prize master, in which notice of abandonment having been given on capture, the loss was held total, notwithstanding ship's arrival in England and decree by Admiralty to owners. And cf. Shepherd *v.* Henderson (1881), 7 App. Cas. at p. 71.

(*o*) Chapman *v.* Benson (1847), 5 C. B. 330; 2 H. L. Cas. 696; Fleming *v.* Smith (1848), 1 H. L. Cas. 513, 533. Cf. Rosetto *v.* Gurney (1851), 11 C. B. at p. 188.

ingly, but not accepted. Meanwhile, only two days after the "Hyder Ali's" arrival at New York, the "William" was brought, by the eight seamen who had boarded her, into Newport, Rhode Island (a harbour about two hundred miles off), and there, with the knowledge of her owners, who did nothing to prevent the proceeding, was sold to pay the salvage, which amounted to about two-thirds of the price she sold for. The Court, on the whole of the above circumstances, held that the assured could not insist on their notice of abandonment and recover as for a total loss. For, first, the ship had never effectually been lost to the assured at all, their right of possession and control over her never having in fact ceased; for the eight seamen who boarded her as salvors must be regarded as their agents (*p*), and they had taken possession of her directly she was left by the original crew. Secondly, the ship was restored to her owners, after notice of abandonment, under such circumstances that they might have had possession of her again if they pleased, and might reasonably have been expected to take it; and they could not entitle themselves to recover as for a total loss by permitting the salvors to have recourse to a sale which, not being necessary, was not justifiable (*q*). Sect. 1107.

On the other hand, in Lozano *v.* Janson, the ship while on the coast of Africa was seized by a British cruiser, carried to St. Helena, and there condemned by the Vice-Admiralty Court for being engaged in the slave trade. The cargo, which was the subject of insurance, was also condemned, unloaded, and stored in St. Helena, to abide the results of an appeal to the Privy Council. The taking was unlawful, the charge being unfounded. But the assured, who had abandoned within proper time, were held entitled to recover, as their property, though in existence, never after had been placed "under such circumstances that if they pleased they might Lozano *v.* Janson.

(*p*) It is doubtful, however, whether this ground for the decision could be now supported. See Aitchison *v.* Lohre (1879), 4 App. Cas. 755.

(*q*) Thorneley *v.* Hebson (1819), 2 B. & Ald. 513.

Sect. 1107. have had possession, and might reasonably have been expected to take possession of it" (*r*).

Arrest, detention, or embargo.

1108. Subject to the same limitations, there can be no doubt that arrest, detention, or embargo of the ship, whether by a hostile or friendly government, gives a *primâ facie* right of abandonment in all cases where there is an apparent probability that the owner's loss of the free use and disposal of his ship, once total, by the arrest or embargo, may be of long or, at all events, of very uncertain continuance.

Rotch *v.* Edie.

Thus, where the ships of an American merchant, resident at time of action brought in this country, had been seized and detained by the French government in their port of loading, it was held that under a policy, at and from such port, he might recover as for a total loss, upon due notice of abandonment, more especially as it appeared that the ships, at the time of action brought, were still detained and had then been so for three years (*s*).

If the arrest be only of very short duration, it is no ground for abandonment.

Of course, if the arrest creates only a temporary obstruction of the voyage without giving rise to any permanent loss of control over the ship, it cannot give any right to abandon. Thus where, on the occasion of a famine at Corfu, some Venetian cruisers, meeting at sea a Genoese ship laden with corn, carried her into Corfu, and after taking out and paying for the corn let the ship go free, this was decided in the Rota Court of Genoa to give no ground of abandonment to the assured on ship (*t*). So where a British ship was detained eleven days by a British man-of-war, to prevent her proceeding to a port where an embargo was laid on all British vessels, it was held that the assured on ship could not abandon on this ground (*u*).

Foreign law.

1109. In France the assured is allowed to give notice of

(*r*) Lozano *v.* Janson (1859), 2 E. & E. 100; 28 L. J. Q. B. 337.

(*s*) Rotch *v.* Edie (1795), 6 T. R. 413.

(*t*) Roccus, No. 60, cited 1 Emerigon, c. xii. s. 30, p. 527; and see Boulay-Paty, Com. vol. ii. p. 219.

(*u*) Foster *v.* Christie (1809), 11 East, 205.

abandonment immediately after capture; but in case of detention by arrest or embargo he is obliged to wait before doing so for different periods fixed by the 387th Article of the Code de Commerce (*x*). By the German Code (*y*) periods of six, nine and twelve months are fixed, after which abandonment may be made; but notice of abandonment must be given before the expiration of the respective periods. The Italian Code has similar regulations (*z*). Sect. 1109.

In this country no precise period is fixed, but immediately on hearing that his ship is detained by an embargo, the assured may give notice of abandonment, subject of course, as in all other like cases, to have his right to recover for a total loss defeated by the restoration of the ship before action brought (*a*).

To avoid any such necessity as this, and to avoid the expense of litigation whilst the intelligence is uncertain or the loss transitory, seems to have been the intention of the parties to the policy in the following case. A Prussian ship from Riga to London, whilst war was imminent between Denmark and the German powers, was insured against capture, seizure, or detention, or the consequences thereof—"to pay a total loss thirty days after receipt of official news of the embargo or capture without waiting for condemnation." By reason of sea damage she was forced into Elsinore for repairs, and whilst there the Danish government laid an embargo on Prussian shipping on the 3rd of February. On the 4th the news reached London, and was, upon the information of the London firm that received it, entered the same day in the "Lost Book" at Lloyd's. This was found by the jury to be "receipt of official news." On the 5th a notice of abandonment was given by the assured. By this mode of reckoning the thirty days expired on the 6th of March. On the 13th of March the embargo was raised and the ship restored, no action at that time having been com- Fowler *v.* Eng. and Scot. Mar. Ins. Co.

(*x*) See Code de Com. art. 387.
(*y*) Arts. 865, 868.
(*z*) Di Commercio, arts. 485, 486.
(*a*) See 6 T. R. 425.

Sect. 1109. menced. The question was whether the bringing of an action was necessary to the right of the assured to recover for a total loss under this policy. It was held that the words "without waiting for condemnation," as they merely expressed the rule of law, added nothing to the other words of the condition, and that these other words bound on the one hand the insurer absolutely to pay on the expiration of the thirty days if the ship were not then restored, and on the other the assured to wait that time for the restoration of the ship as the sole condition of the insurer's absolute liability to pay a total loss (*b*).

Effect of repurchase of ship by the master.

1110. In some of these cases of capture, seizure, and arrest, a question has been raised as to the effect of a repurchase of the ship by the master, upon the right of the assured to recover as for a total loss. And the doctrine here appears to be that where the property in the ship has never been devested out of the owners by lawful condemnation (*c*), and the ship, after being legally repurchased by the master acting *bonâ fide* and justifiably for their benefit, is brought back to this country under such circumstances that the owners may if they please take possession of her on payment of the amount of repurchase money, and of any sums that may have been expended abroad in repairing her, they cannot, by refusing to do so, entitle themselves to recover as for a total loss—at all events, in cases where they have given no notice of abandonment, nor even, as it should seem, where they have.

M'Masters *v.* Schoolbred.

Thus where a ship, after condemnation by a French consul in a neutral port (which, being illegal, effected no change in the property), was lawfully repurchased by the master on account of the owners, and, after being repaired abroad, brought back by him to this country before the commence-

(*b*) Fowler *v.* English and Scottish Mar. Ins. Co. (1865), 18 C. B. N. S. 919; 34 L. J. C. P. 253.

(*c*) Where there has been a lawful condemnation it appears that there would be an actual total loss, which would not be affected by any repurchase by the master. Notice of abandonment would, therefore, be unnecessary. Mr. McLachlan, however (6th ed. p. 1043), seems to have taken a different view.

ment of the action, Lord Kenyon held that the plaintiff, who refused to pay the amount of the repurchase money and the costs of the repairs abroad, could not thereby entitle himself to recover a total loss—at all events, as he had given no notice of abandonment—but that he had only a right to recover an average loss to the amount of the sum spent in the repairs and repurchase (*d*). The same decision was given in a case where the master, acting for the benefit of his owners, had repurchased and repaired a ship which had been seized in Pillau (her port of discharge) by the Prussian government, under the Berlin decree, and there put up to sale at public auction. The master in this case, after repairing, had navigated the ship safely home, where the owners might have had her on paying the amount of a bottomry bond which the master had given for the money with which he had repurchased her; but they, declining to interfere, allowed her to be sold to satisfy the bond, and then, without having given notice of abandonment, claimed a total loss. The Court, however, said, that, as in this case there had been an unlicensed seizure, whereby the property in the vessel remained unchanged, the repurchase by the master must be considered as a salvage expenditure on account of his owners, and that the latter were therefore not entitled to recover for a total loss, but merely for the amount of the expenses incurred in the repurchase and repairs (*e*).

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Wilson *v.* Forster.

Several cases have been decided in the United States as to the effect of such repurchase on the rights of the parties, where notice of abandonment has been given before the sale in fact took place; the result of those authorities appears to be, that the master in repurchasing is to be regarded as the agent of the owners before notice of abandonment, and after it as the agent of the underwriters (*f*).

Doctrine in the United States.

(*d*) M'Masters *v.* Schoolbred (1795), 1 Esp. 237.

(*e*) Wilson *v.* Forster (1815), 6 Taunt. 25; 1 Marsh. R. 425. The latter report is the better: the effect of the decision appears to be as above stated.

(*f*) See 2 Phillips, Ins. ss. 1580, 1591.

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Cases of innavigability:

1111. Where the ship is totally wrecked in the course of the voyage—*i.e.*, completely broken up by the perils insured against, so that her hull is dismembered and her planks and timbers scattered on the sea—this, as we have already seen, gives the assured a right to recover as for a total loss without notice of abandonment, and *à fortiori* would entitle him so to recover where notice of abandonment has actually been given. The case is the same where, although the ship's timbers hold together so that she retains the shape of her hull, she is yet so shattered as to be reduced to a mere mass of materials, or "congeries of planks," so that she would require reconstruction rather than repair to make her a sea-going ship again (*g*).

Where the ship is wrecked in pieces, or reduced to a mere congeries of planks, an absolute total loss.

Where wrecked or stranded without such utter disability, only a constructive total loss.

There are, however, other cases: a ship may be stranded or driven ashore without this extreme amount of absolute disability being at once produced, and yet under circumstances which make the chances of her being ultimately extricated from the peril at all exceedingly precarious, or the probable expense of so extricating and repairing her as to be able to keep the sea, as a ship, greater than would be justified by her estimated value when repaired.

1112. Considerable difficulty has been experienced in discovering a practical test by which to ascertain when the assured on ship in such cases shall be entitled to recover as for a constructive total loss. The point, however, in our own law was considered by Arnould (*h*) as fixed with tolerable certainty by a long course of judicial decisions, the result of which he expressed as follows:—

Principles of constructive total loss in such cases.

First; if, by the perils of the seas, the ship be so damaged as to be incapable of proceeding on her voyage or keeping the sea without repairs, at a place where such repairs cannot be procured—either from want of materials or from the

(*g*) Cambridge *v.* Anderton (1824), 2 B. & Cr. 691; 4 Dowl. & Ryl. 203; Allen *v.* Sugrue (1828), 8 B. & Cr. 561; 3 M. & Ryl. 9. The law is the same in France: 4 Boulay-Paty, Droit. Mar. p. 231. By art. 369 of the Code de Commerce, abandonment of the subject-matter insured may be made in case of damage amounting to three-fourths of its value.

(*h*) 2nd ed. p. 1089.

master's total inability, after using his best exertions, to obtain either money or credit for the purpose of raising funds to repair—that is a case of constructive total loss on ship. Sect. 1112.

Secondly; the case is the same when the ship, by the like perils, is driven ashore, or otherwise placed in a position of imminent hazard, and by reason of the casualty reduced to such a state of innavigability that a prudent owner, if uninsured and on the spot (*i*), would, in the exercise of the best and soundest judgment that could be formed under the circumstances, rather sell her as she lay than attempt to repair her—either because there is no reasonable probability of her ever being delivered from the peril at all or because the expense of repairing her, so as to be capable of keeping the sea as a ship again, would exceed her value when repaired.

Old rule as to effect of sale by master.

1113. In many of the old cases, the question as to the right of the assured on ship, in respect of such casualties, to recover as for a total loss will be found to have arisen after the exercise by the master of the power which the law gave him in cases of extreme emergency to sell or otherwise dispose of the ship, for the benefit of all concerned. In such cases this question was very generally made to turn on the point whether the sale by the master was or was not justified by the urgent necessity of the case, it being considered that, wherever the circumstances were such as to justify the master in selling, there was a total loss in respect of which the assured might recover from his underwriters.

(*i*) The test of the "prudent uninsured owner" has, however, been a good deal misunderstood. This imaginary individual would, of course, always take the course most likely to minimise his loss; but the mere fact that his cheapest course would be to sell does not constitute a constructive total loss. The resolution to sell must be due to the motives stated in the text—*i.e.*, his judgment that the ship cannot be rescued, or that she can only be repaired at a cost exceeding her repaired value—and to no others. It has been thought necessary to add this word of warning here in view of the opinion which we have subsequently expressed, as to his right to add to the cost of repairs the value of the wreck, and then claim for a constructive total loss if the aggregate exceeds the repaired value. See *infra*, s. 1124.

Sect. 1113. It is hardly necessary to enter into an elaborate discussion as to whether this view of the law was strictly accurate. In the twentieth century, owing to the perfection of the telegraph system, circumstances will rarely arise such as to justify a sale by the master without instructions from those directly interested. And while considering the old cases, it must be remembered that a total loss was never constituted by the mere fact of sale, but by the state to which the ship was reduced prior to the sale by perils insured against (*k*). In reality the utmost effect of a sale, according to these principles, was probably nothing more than to convert what prior to the sale was a constructive total loss into an absolute total loss, so as to relieve the assured from the necessity of giving notice of abandonment.

Where sale necessitated by want of men or materials for repairing.

1114. Bearing these principles in mind, we proceed to refer shortly to the authorities as to the right of the assured to recover as for a total loss in respect of the innavigability of the ship, under Arnould's two headings. As regards cases falling under the first heading, Valin says, "that the assured on ship has a clear right to abandon if, in the place where the ship goes ashore, or in its neighbourhood, there are neither materials nor workmen for the repairs": "the same right," he says, "also attaches where, though materials and workmen can be found, yet the master has no means of raising funds to pay for the repairs" (*l*).

(*k*) "There is no such head of insurance law as loss by sale": per Bayley, J., in Gardner *v.* Salvador (1831), 1 Mood. & Rob. 117; or, as Phillips expressed it: "The assured abandons not because the sale has given the right, but because the events which induced the sale had occasioned a total loss." Ins. s. 1571. Arnould, in the corresponding passage (2nd ed. p. 1090), and indeed elsewhere in his chapter on constructive total loss, uses language implying that a vessel after sale may still be only a constructive total loss. If, however, it be true to say that a constructive total loss is a total loss where no notice of abandonment is required, then, inasmuch as Rankin *v.* Potter (see *post*, s. 1163) has now decided that notice of abandonment is never requisite where nothing can pass thereby to the underwriter, it cannot be correct to consider the loss after sale as constructive merely.

(*l*) 2 Valin, Ord. Mar. 345—347; Pothier, No. 120, pp. 181—185, ed. 1810; 4 Boulay-Paty, Droit Mar. 278.

"If the master," says Tindal, C. J., "has no means of getting the repairs done in the place where the injury occurs, or if, being in a place where they might be done, he has no money in his possession and is not able to raise any, then he is justified in selling, as the best thing that can be done" (*m*); and the learned Judge intimated that under such circumstances there would be a total loss. Sect. 1114.

1115. It may be doubted whether a real physical unprocurability of either men or materials is in practice ever likely to arise in the future (*n*). Commercially speaking, however, men and materials would be considered to be unprocurable, when the cost of procuring them would be out of all proportion to the advantage to be gained thereby. To such a case the dicta we have cited may yet, perhaps, some day be practically applied. A vessel so conditioned and so circumstanced would appear to be as much a total loss for all useful purposes as if she were a wreck. And, this result having been brought about by sea-perils, her owners could recover from their underwriters accordingly (*o*).

Where sale due to want of funds or credit, so as to effect repairs.

It is likewise doubtful whether cases are likely to occur in future, where impossibility of repairing arises merely from the inability of the master to obtain funds or credit. In the twentieth century most, if not all, places of sufficient importance to contain supplies of men and materials for repairing will be in telegraphic communication with the ship's home port, whence instructions and credit can usually be obtained. And even if such a case were now to occur, it would be at least possible to contend that the total loss

(*m*) In Somes *v.* Sugrue, 4 C. & P. at p. 283.

(*n*) A physical impossibility of repairing might, however, arise owing to the absence of a proper dry dock or repairing yard. In this case there would be, according to Willes, J., an actual and not merely a constructive total loss. See Barker *v.* Janson (1868), L. R. 3 C. P. at p. 305. So, too, Lowndes, Mar. Ins. s. 134.

(*o*) Cf. Moss *v.* Smith (1850), 9 C. B. at p. 102, per Maule, J.; Barker *v.* Janson, *ubi supra*. *Secus*, however, where there is not an impossibility but a mere difficulty in procuring what is requisite, or where mere expense is the only hindrance. Furneaux *v.* Bradley (1780), 1 Park, Ins. 363; Somes *v.* Sugrue (1831), 4 C. & P. 276.

Sect. 1117. The same doctrine was established in the United States, and was thus expressed by Story, J.: "If the circumstances were such that an owner, of reasonable prudence and discretion, acting upon the pressure of the occasion, would have directed the sale, from a firm opinion that the vessel could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value, then the sale by the master is justifiable" (*y*).

Difference in the United States.

The great difference between the doctrine in the two countries is this: that in America it is a constructive total loss whenever the cost of repairs exceeds one-half the repaired value; here it is only so when such cost exceeds the full repaired value (*z*).

In considering the decided cases, it will be found that in some, especially of the earlier decisions, the hopelessness of being able to extricate the ship from the peril at all has been the main ground on which the Courts seem to have relied,

has been a sale no notice is necessary, and that the loss is absolute, not constructive merely. In this and other similar passages, Arnould's language has been altered in view of the decision above mentioned.

(*y*) Per Story, J., in The Sarah Ann (1835), 2 Sumner, 215; cited 2 Phillips, s. 1583.

(*z*) This distinction appears to have been established in America for 100 years at least. See Fuller *v.* M'Call (1795), 1 Yeates, 464; Gardiner *v.* Smith (1799), 1 Johns. 142; Macardier *v.* Chesapeake Ins. Co. (1814), 8 Cranch, 39. Mr. Carver, in a paper read in September, 1899, at the Eighteenth Conference of the International Law Association at Buffalo, U. S. A. (see Report: Clowes & Sons, 1900), considers it to be due, to some extent at least, to Park on Insurances, the first edition of which appeared in 1786. See 7th ed. p. 231; 8th ed. (1842), vol. i. p. 336. Many of the Continental codes allow a total loss where the damage amounts to 75 per cent.; this percentage is calculated, however, on the ship's value before, and not after repairs. Mr. Carver suggests that the doctrine of constructive total loss, as distinct from that of the right of an assured to give notice of abandonment, is the result of a development of the English law. The older idea, on which the foreign codes are based, was that a great disaster, which might or might not amount or approach to a total loss, entitled an assured to pass over to his insurers the whole risk and difficulty and recover from them the whole sum insured. And Mr. Carver points out that even in this country Arnould, writing as late as 1857 (2nd ed. p. 1066; see this edition, s. 1091), did not clearly recognize the idea of constructive total loss as independent and complete in itself. In this edition, also, Arnould's language to a like effect has been in several passages retained.

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as justifying the sale and making the loss total; in others, and this applies generally to the later authorities, the principal test has been the cost of repairing the ship as compared with her estimated worth when repaired; in others, again, the two considerations have been blended together.

General doctrine of the right of the master to sell the ship, as stated by Parke, B., in Hunter *v.* Parker.

1118. With regard to the general right to sell the ship, as between the master and owner, the doctrine according to English law was nowhere stated with greater precision and accuracy than by Parke, B., in the case of Hunter *v.* Parker, viz.: "That the master has, by virtue of his authority, not merely those powers which are necessary for the navigation of the ship and the conduct of the adventure to a safe termination, but also a power, when such termination becomes hopeless and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to dispose of her for their benefit" (*a*).

It is only necessary here to consider this principle, in so far as it is mixed up with the question of the right to recover for a total loss as between the assured and the underwriters, of which in many of the cases it is made the principal test.

Idle *v.* Royal Exch. Ass. Co.

A timber-laden ship bound from Quebec to London encountered such furious gales, and was in consequence making water so rapidly, that the master was forced to run her ashore in the St. Lawrence. She took the ground outside a reef of rocks at the entrance of Kamouraska Bay in the full tideway of the river, so as to be exposed to the whole force of the drift ice, which was already beginning to float down in large masses. The master went up to Quebec and procured two surveys to be made, the result of which was that the surveyors advised him to sell her as soon as possible, being of

(*a*) 7 M. & W. 342; treating the case of Reid *v.* Darby (1808), 10 East, 143, as overruled to this extent by the subsequent cases of Robertson *v.* Clarke (1824), 1 Bing. 445; Cambridge *v.* Anderton (1824), 2 B. & Cr. 691; 4 D. & Ryl. 203; Somes *v.* Sugrue (1830), 4 C. & P. 276, &c. Modern facilities, however, of communicating with owners have undoubtedly affected the right of the master to take this course upon his own motion.

Sect. 1118. opinion that, where she lay, she was in imminent danger of being carried away and destroyed by the ice. Accordingly, under the direction of the agent for the owners at Quebec, who was also himself one of the part owners and attended the sale, the master sold the ship as she lay, together with her rigging, stores and cargo, for about 2,060*l.* Contrary to all reasonable expectation, the ship survived the winter of 1810, and having, in the course of the next spring, been got off by the purchaser at great expense and floated up to Quebec, she was repaired there at a cost of about 550*l.*; and that same season performed a voyage to England, bringing over a full cargo and earning full freight. The plaintiff in the action, who had insured her freight and cargo, and had received information at one and the same time of the casualty and the sale, claimed a total loss on the freight without having given any notice of abandonment.

The jury at the trial found that the master had acted throughout the whole transaction fairly and *bonâ fide*, and that the sale was honestly, fairly and properly conducted with a view to the benefit of all concerned.

Judgment in Idle *v.* Royal Exch. Ass. Co.

1119. On motion for a new trial, one of the questions made before the Court of Common Pleas was whether, under the circumstances, the master had a right to sell the ship and cargo; and on this point it was held that the master was justified in selling on the ground of urgent necessity, and that being so, that the loss was total (*b*). Dallas, C. J., said: "Here it is said that the loss arose out of the act of the owner in selling, and that the sale was not induced by any peril of the sea. But this distinction seems to me to be a fallacy: the state of the ship, which led to the sale, was induced by the perils of the sea; she had incurred damage in the course of her voyage which made it necessary to run her on shore, and she was stranded at the time; there was no

(*b*) Idle *v.* Royal Exch. Ass. Co. (1819), 3 Moore, 115; 8 Taunt. 755. It has already been shown that notice of abandonment is unnecessary where a constructive total loss is followed by a sale. See *ante*, s. 1113.

reason for supposing she would have been got off the rocks, but, on the contrary, every probability of her going to destruction" (*c*). Sect. 1119.

It certainly seems that in this case there existed, prior to the sale, such a state of circumstances as would now be held to constitute a constructive total loss; and if so the master would, in the absence of the means of communicating with his owners which we now possess, be justified in selling. When, however, it came up on a special verdict before the Court of King's Bench, that Court expressed a clear opinion that the necessity of the sale could not be inferred from the facts stated, and awarded a *venire de novo* for the purpose of trying whether such necessity existed (*d*).

1120. By the cases we have referred to it is sufficiently clear that if there is either no reasonable chance of restoring the ship at all, or only at a cost exceeding her value when repaired, the assured may recover as for a total loss.

No constructive total loss unless reasonably clear that ship cannot be extricated from position of peril, or that the cost of repairs would exceed her repaired value.

It must, however, carefully be borne in mind that a sale in the olden days was never justified, nor was a constructive total loss established, unless the facts were such as to make it clear beyond all reasonable doubt, either that the ship could never be extricated at all, or only at a cost greater than her repaired value; if this was not so, mere *bona fides* in the master or owner who sold would not justify the sale nor bear out the assured in his claim for a total loss.

And with regard to the estimated cost of repairs, Tindal, C. J., told the jury in Somes *v.* Sugrue, "that it must not be a mere measuring cast, not a matter of doubt and uncertainty whether the expense would or would not have exceeded the value, but it must be so preponderating an excess of expense, that no reasonable man could hesitate as

Not a "mere measuring cast."

(*c*) 3 Moore, 151.

(*d*) 3 Brod. & Bing. 151, note (*a*). See also Hunter *v.* Parker (1840), 7 M. & W. 322; Robertson *v.* Carruthers (1819), 2 Stark. 571; Robertson *v.* Clarke (1824), 1 Bing. 445; 8 Moore, 622; Mount *v.* Harrison (1827), 4 Bing. 388; 1 Moore & P. 14.

Sect. 1120. to the propriety of selling under the circumstances, instead of repairing" (*e*).

So, again, with regard to the probability of ever extricating the ship at all, a total loss was not established and the sale was not justified if the master had formed a hasty judgment, or resorted to that measure without having previously exhausted all the means in his power for the recovery of the ship. Where, by means within his power, she could be so treated as to retain the character of a ship, he could not, by selling her, even *bonâ fide*, convert the average into a total loss; but the underwriters were entitled to have those means used on their account.

Doyle *v.* Dallas.

1121. The following cases illustrate these positions:—

The ship "Triton," having struck on an anchor in Buenos Ayres roads, filled rapidly, and the next morning sank, so as to be completely under water at high tide, but only partly so at ebb. In the course of the same day, the captain had the ship surveyed by some ships' captains and a Lloyd's agent, who recommended she should be sold, as the expense of raising her would probably be more than she was worth, and the plaintiff accordingly next day sold her for about 270*l.* Two days after this the shifting of the wind to the north—a circumstance which was well known to all seafaring men in those parts to lower the level of the water in Buenos Ayres roads—enabled the purchaser to get the ship afloat, and he afterwards repaired her at an expense of about 1,300*l.*, so as to be fit for the Brazilian coasting trade, but not for carrying on to England a cargo of hides which the plaintiff had contracted for at the time of the loss. The worth of the vessel before the accident was about 2,500*l.*; what her value was after the repairs is not clearly stated.

(*e*) 4 C. & P. 283. On the facts of this case the jury found for the defendant, but the Court granted a new trial on the ground that the verdict was against the evidence. See also, in illustration of the position in the text, Morris *v.* Robinson (1824), 3 B. & Cr. 196; 5 Dowl. & Ryl. 35; Cannan *v.* Meaburn (1823), 1 Bing. 243; 8 Moore, 127.

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On this state of facts the plaintiff claimed to recover as for a total loss: his right to do so, Lord Tenterden told the jury, depended on the question whether, at the time of the sale, that measure, in the sound exercise of the best judgment, appeared most beneficial for all parties. "Now the correctness of this judgment," said his Lordship, "would depend on two circumstances: 1. The probability of being able to raise the vessel at all; and, 2. The power of repairing her, if raised, at a price rendering it worth while to do so."

The impossibility of being able to raise the ship at all, was decided on too soon. The ship need not be so repaired as to be able to carry on her original cargo, but only so as to be able to keep the sea.

With respect to the first of these questions, his Lordship expressed the opinion that the sale took place too soon. And with regard to the second point his Lordship, after adverting to the point made by the plaintiff's counsel—viz., that after all these expenses she was still unfit to sail to England with a cargo of hides, such as the plaintiff had contracted for—said: "I do not think that circumstance enough to justify the sale; the underwriters do not undertake that the ship shall be able to carry this or that cargo. If the ship could have come to England, even in ballast, I think, (certainly with any cargo), so that on her arrival she would have been worth the money expended on her, she ought to have been repaired for the purpose. The loss of the voyage will not, in my opinion, make a constructive total loss of the ship." The jury, upon the whole facts, found a general verdict for the underwriters, which the Court, on motion for a new trial, refused to disturb (*f*).

The subsequent recovery and repair of the ship by the purchaser, even at a trifling cost, will not neces-

1122. In most of the older cases it will be observed that the ship, after the sale, was ultimately got off by the purchaser, and so restored by him as to be rendered navigable as a ship again. Of course, if this were done with comparatively little difficulty, and at a cost far less than her repaired value, it would be one amongst other circumstances to show the

(*f*) Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48. In this case there was no effectual notice of abandonment. Gardner *v.* Salvador (1831), 1 Mood. & Rob. 116; Domett *v.* Young (1833), 1 C. & M. 465; and Knight *v.* Faith (1850), 15 Q. B. 649, are to a similar effect.

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sarily defeat the right of the assured to recover as for a total loss.

jury that the sale was not justified by necessity, and that the assured consequently could not recover as for a total loss; but, generally speaking, it may be laid down as the result of the cases that the jury, in considering whether the sale was justified, must look mainly (if not exclusively) to the state of the circumstances at the time of sale. "The question is not whether by possibility, if a different conduct had been pursued by the master, the ship might not eventually have been saved, but whether, exercising the best discretion he could on the subject-matter, he was not justified in selling, without entering into a nice and minute calculation" (*g*).

The same doctrine was held in the United States, and is thus stated with admirable clearness by Story, J.: "In the case of a sale of ship and cargo by the master, which can only be justified by urgent necessity, if such necessity does apparently exist at the time and on the spot, I conceive that the master will be justified, although subsequent events may show that a different course might have been attended with success" (*h*).

If the sale was otherwise justifiable, it makes no difference as to the right to recover for a total loss, whether it was by the master or owner.

It further appears from the older authorities (when the point was of importance) that, as between the assured and the underwriter, if the sale was otherwise justifiable, it made no difference whether it were conducted by the master alone, where the assured had no agent, or by the master, with the sanction and attendance of one of the part owners as agent for the rest (*i*), or even by the assured himself, being both master and owner and also plaintiff in the action (*k*), "on the broad ground," says Dallas, C. J., "of a power to act on a sudden emergency, to save as much as could be saved from

(*g*) Per Abbott, C. J., in Robertson v. Carruthers (1819), 2 Stark. 572.

(*h*) Per Story, J., in The Ship Fortitude (1838), cited 2 Phillips, s. 1524. See also, to the same effect, the remarks of Kent, C. J., in Fontaine v. Phœnix Ins. Co. (1814), 11 Johns. 293; cited 2 Phillips, s. 1577.

(*i*) As in Idle v. Royal Exch. Ass. Co. (1819), 3 Moore, 115; 8 Taunt. 755.

(*k*) As in Green v. Royal Exch. Ass. Co. (1815), 1 Marsh. R. 447; 6 Taunt. 68; and in Doyle v. Dallas (1831), 1 Mood. & Rob. 48. In Knight v. Faith (1850), 15 Q. B. 649, the sale was by the master, who was also a part owner.

impending ruin, whether it be the owner or captain will make no difference, if the circumstances justified the selling and the sale was honestly and fairly conducted" (*l*). Sect. 1122.

1123. In the cases hitherto noticed a sale, whether by the master or by the owner, who is also plaintiff in the action, had in fact taken place before notice of abandonment and claim to recover as for a total loss. It must, however, be remembered that it is not the sale itself which creates the total loss, but the ship's being reduced to such a state as to justify a sale; and it is quite certain that although no sale may have intervened, yet if the state of the ship be such as would have justified a prudent owner, if uninsured, in the exercise of a sound discretion, to sell rather than to repair, from a reasonable certainty that the cost of repairs would exceed the repaired value, this is a constructive total loss (*m*). Sale not necessary to constitute a total loss.

The rule of law, in fact, is clearly settled, as stated by Tindal, C. J., "that where the damage to the ship is so great from the perils insured against, as that the owner cannot put her in a state of repair necessary for pursuing the voyage insured, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon and treat the loss as a total loss" (*n*). And to the same effect are the words of Lord Watson in a recent case in the House of Lords (*o*), as follows: "The test, as I understand it, is simply this: that in order to instruct a total constructive loss, at the date to which the inquiry relates, it must be shown that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, but would have left her at the bottom of the sea, because her market value (*p*) when raised and re- Rule of English law: constructive total loss where cost of repairs would exceed the repaired value.

(*l*) Per Dallas, C. J., 3 Moore, 148.

(*m*) Allen *v.* Sugrue (1828), 8 B. & Cr. 561; 3 Mann. & Ryl. 9; Young *v.* Turing (1841), 2 M. & Gr. 593.

(*n*) In Benson *v.* Chapman (1843), 6 M. & Gr. 810.

(*o*) Sailing Ship Blairmore Co. *v.* Macredie, [1898] App. Cas. at p. 603. English and Scottish law are the same on this point. *Ibid.*

(*p*) As to market value, however, see Grainger *v.* Martin (1862), 31 L. J. Q. B. 186.

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paired would probably be less than the cost of restoration and repair [q]. That, in my opinion, was the test as explained by the consulted Judges and accepted by this House in Irving v. Manning" [r].

Result of authorities.

1124. It thus appears clear, not only from these authoritative expressions of opinion, but also from all other judicial deliverances upon this subject with the few exceptions to be subsequently noticed, that it is necessary in order to establish a constructive total loss, that the cost of the repairs should exceed the repaired value of the vessel. If this could be established upon any less stringent conditions, it is hardly conceivable that they should not have been noticed in the course of the judgments to which we have referred.

Should the value of the wreck or damaged vessel be taken into account in questions of constructive total loss?

"Prudent uninsured owner" test.

Nevertheless a misconception, as the editors submit it to be, on this point has been allowed to find its way into recent text-books [s], and also into the minds of more than one of our learned Judges. This misconception is partly due to an *obiter dictum* of Lord Abinger in Young v. Turing [t], but probably still more to an unguarded use of the expression "prudent uninsured owner." It has been stated that inasmuch as a prudent uninsured owner would clearly, in considering whether or not he should sell or repair his damaged vessel, take into consideration the value of the damaged vessel as she lies, this amount should be added to the cost of the repairs, and a constructive total loss will be established if the aggregate exceed the repaired value, although the cost of repairs alone would not have exceeded it. Thus, it is argued, suppose the damaged value to be 2,000*l.*, the cost of repairs 10,000*l.*, and the repaired value 11,000*l.*; then, since the prudent uninsured owner would clearly rather sell the damaged vessel for 2,000*l.* than spend 10,000*l.* on a thing which after such expenditure would only be worth 11,000*l.*,

(q) Including, of course, general average expenditure by way of salvage, or otherwise incurred with this object. Kemp v. Halliday (1866), L. R. 1 Q. B. 520.

(r) (1847), 1 H. L. Cas. 287.

(s) Lowndes, Mar. Ins. s. 135; Gow, p. 150.

(t) (1841), 2 M. & Gr. 593; 2 Scott, N. R. 764.

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this is a case of constructive total loss. But, as we have already intimated (*u*), and as Mr. McArthur has very clearly pointed out (*x*), the true criterion is not whether the owner can do better for himself pecuniarily by repairing or by selling, but whether or not the condition of the vessel is such as to be from a commercial point of view irreparable, or, in other words, whether or not the repaired value of the ship would be swallowed up by the cost of restoration. The question is simply, Is the vessel worth repairing (*y*)? The prudent uninsured owner is not to be at liberty to decline to repair on account of his general pecuniary interest, but only on the ground that it would be a waste of money to spend it on an object which, after the expenditure, will not be worth more than the outlay. Or, to use the language of Maule, J. (*z*), "If a ship sustains such extensive damage that it would not be reasonably practicable to repair her,—seeing that the expense of repairs would be such that no man of common sense would incur the outlay,—the ship is said to be totally lost. It is in that way alone that the question as to what a prudent owner would do, arises." The result of such a contention would, if pushed to its logical conclusion, convert almost every partial injury into a total loss (*a*). Lowndes, who is, perhaps, the chief advocate of the contention which we are engaged in criticising, would apparently meet this objection by limiting the value of the damaged vessel, which he maintains the owner is entitled to take into account, to her value for breaking up purposes. But, to quote Mr. McArthur's answer to

(*u*) *Supra*, s. 1112, n. (*i*).

(*x*) Ins. p. 149, note (*q*).

(*y*) So, according to sect. 61 of the Marine Insurance Bill of 1899, "there is a constructive total loss where she is so damaged, by a peril insured against, that the cost of repairing the damage would exceed the value of the ship when repaired."

(*z*) In Moss *v.* Smith (1850), 9 C. B. at p. 103.

(*a*) *E.g.*, suppose a vessel comes into port requiring repairs costing 1,000*l.*—her damaged value being 10,000*l.*, and her repaired value 10,500*l.* This, according to the argument derived from Young *v.* Turing, would be a case of constructive total loss. But it is submitted that it is absurd to say a vessel is a total loss, whether constructively or otherwise, which is only damaged to the extent of 10 per cent. or less.

Sect. 1124. Lowndes on this point, "if, as the argument implies, the action of the owner in selling or repairing is to depend upon which of these two courses would have the better pecuniary result, there is no reason why the damaged value of the vessel should be limited to her value for breaking up. The owner would naturally take into account the highest price he could obtain for the vessel, and the question would then resolve itself into whether he could do better by repairing the ship or selling her. Upon that principle, a partial loss might be converted into a total loss, whenever the excess of the repaired value over the damaged value was less than the cost of the repairs."

The exceptions to the current of judicial opinion on this point consist of a passage from Lord Abinger's judgment in Young *v.* Turing which undoubtedly supports Mr. Lowndes' view. The point was, however, immaterial to the case before his Lordship, and does not appear to have been argued before him. And Barnes, J., is said to have intimated that he was inclined to be of the same opinion in two cases which came before him recently (*b*). And still more recently Phillimore, J., in a case at Liverpool Assizes, ruled after argument that a shipowner claiming for a constructive total loss was entitled to add the damaged value to the cost of the repairs, and admitted evidence of such value accordingly (*c*).

The editors nevertheless respectfully submit that the dicta in Young *v.* Turing, and any opinions based thereon, are founded neither on principle nor on authority.

Should pending freight be taken into account?

1125. The same misapprehension of the "prudent uninsured owner" test has led not only Messrs. Lowndes (*d*) and Gow (*e*), but also Mr. McArthur (*f*) to the conclusion that, in com-

(*b*) The Thornhill (unreported), and Martin *v.* Sydney Lloyds, in December, 1896, both referred to in the report of Beaver Line, &c. *v.* London, &c. Ins. Co., (1899) 5 Com. Cas. 269.

(*c*) Beaver Line *v.* London, &c. Ins. Co. (1899), 5 Com. Cas. 269.

(*d*) Ins. s. 136.

(*e*) Ins. p. 150.

(*f*) Ins. pp. 148, 149.

puting a constructive total loss, pending freight must be taken into account, so that if the vessel at the time of the accident is under beneficial engagements, her value must be considered to be by so much enhanced. The editors, for the reasons above given, venture to differ from this view. They submit that according to the criterion laid down in the House of Lords (*g*) and elsewhere, the test is in reality a physical one. From a material point of view, is the fabric of the vessel worth repairing, or is she not? If this is the test, there is no room for considerations which have nothing to do with the condition of the vessel, but merely relate to contractual engagements for her employment into which her owners may have entered (*h*). Sect. 1125.

Or liability of other interests to contribute?

For very similar reasons it is conceived that, both as regards ship and cargo, the fact that some of the cost of repairs or of conditioning may be ultimately recoverable by the owners of the interest insured from the owners of other interests in general average, or otherwise, is irrelevant to any question of constructive total loss. If, for instance, the cost of repairing a ship will be 10,000*l.*, and her repaired value will only be 9,000*l.*, this a case of constructive total loss, notwithstanding the fact that half the cost of the repairs may be eventually recoverable from the owners of the cargo. The final incidence of such expenses should no more be taken into consideration in the case suggested, than in a case where they are recoverable from a wrongdoer. But it could not be contended that a vessel which has been damaged by a collision is any the less a constructive total loss, because the cost of repairing her is recoverable by way of damages from the owners of another ship, by the negligent navigation of which the collision was occasioned.

Assured, after abandonment, has a vested

1126. It has been recently decided that when once the state of facts contemplated by this rule is established, the assured

(*g*) Blairmore Co. *v.* Macredie, *ubi supra*.

(*h*) See Parker *v.* Budd (1896), 2 Com. Cas. 47.

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right to recover for total loss which underwriter cannot defeat.

has a right to abandon and recover for a total loss, and that this right cannot be divested by any action voluntarily taken in their own interest by the underwriters. The facts of the case were that a ship insured under a valued policy sank in deep water, and the underwriters, after receiving notice of abandonment, by a large expenditure of money, succeeded before action brought in raising the vessel. Having done so, they claimed that they were only liable for a partial loss, inasmuch as the vessel was repairable by the expenditure of less money than her total value. The House of Lords, however, declined to adopt this view, Lord Halsbury, L. C., apparently on the ground that the doctrine whereby restoration before action brought defeats a claim for constructive total loss, applies only to cases of capture and the like, and not to cases where a ship goes to the bottom. The *ratio decidendi*, however, of the other members of the Court (Lords Watson, Herschell, and Shand) was, that to allow insurers to "avoid their liability as for a constructive total loss by their intervening gratuitously and taking upon themselves part of the expenses which, *primâ facie*, fall on the assured, and would otherwise have been taken into account in estimating whether there has been such a total loss," would be a contravention of "the rule of law applicable to contracts, whereby neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil" (*i*).

Questions as to the true construction of the rule as to constructive total loss by comparison of cost of repairs with repaired value.

1127. Upon the true construction of the rule several questions have arisen which may, perhaps, be conveniently discussed under the three following heads:—

1. Of what nature are the repairs, the cost of which is to exceed the ship's value? 2. How is the cost of repair to be estimated? 3. What is that value of the ship with which

(*i*) Sailing Ship Blairmore Co. *v.* Macredie, [1898] App. Cas. per Lord Watson, at p. 607. It has been similarly held by the highest authority in the United States (against some previous decisions of the State Courts). Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, 27. Cf. 2 Phillips, Ins. s. 1557.

such cost is to be compared for the purpose of ascertaining whether the loss is constructively total? Sect. 1127.

First, then, as to the nature of the repairs alluded to in the rule. It is now clearly settled that these repairs are not to be such complete repairs as may be necessary to enable the ship to carry on the same cargo, but only such as are necessary to enable her to keep the sea, as a ship, again—in fact, to render her navigable and capable of being carried on, either in ballast or with any kind of cargo, to her port of original destination. Thus, in the case of Reid *v.* Darby, where it appeared that the ship had been sold abroad under a Vice-Admiralty decree, upon a report of surveyors certifying that the ship was totally unfit to proceed with her cargo to her port of destination, and that the expense of such repairs as would enable her to do so would exceed her value when repaired, Lord Ellenborough said, in reference to this part of the case, "it is not found that the ship was not navigable, but only that she was not capable of being navigated home with her then cargo" (*k*). The same circumstance, as we have already seen, has been held by Lord Tenterden not to justify the sale, on the ground that the underwriters indemnify only against the loss of the ship, not of the voyage, and the loss of the voyage, therefore, cannot make a constructive total loss of the ship (*l*).

The repairs alluded to in the rule need not be such as are requisite to enable the ship to carry on her cargo, but only to keep the sea for the voyage.

Reid *v.* Darby.

Doyle *v.* Dallas.

1128. Secondly, as to the mode of estimating the cost of repairs, various questions have arisen both in this country and the United States. It may be taken as a settled rule in this country, that the cost of repairs is to be calculated with reference to all the circumstances attending the ship at the place and time of the casualty—*i.e.*, the question is, what would it have cost to repair the ship where she lies? Thus, where a ship was sold at a port where great difficulty existed in obtaining materials, and at a season of the year peculiarly

The cost of repairs must be calculated with reference to all the circumstances attending the ship at the time and place of the casualty.

(*k*) Reid *v.* Darby (1808), 10 East, 143.

(*l*) Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48. Cf. Thompson *v.* Colvin (1830), Ll. & Wels. 140.

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unfavourable for repairs, Lord Tenterden told the jury to take both these circumstances into their estimation in considering whether the probable cost of repairs was such as to justify the sale (*m*).

So where a Dutch ship, stranded on the Goodwins, and brought into the port of London, would not sell in England for so much as it would cost to repair her here, owing to her being a foreign ship; nor in Holland, for so much as it would cost to repair her there, owing to a usage there not to employ stranded ships again; it was held that the jury were rightly directed to take all these facts into their consideration (*n*).

Estimated cost of partial repairs at the place of the casualty may be added to that of subsequent complete repairs in estimating the cost.

1129. If the condition of the ship at the place of the casualty or at a port of refuge be such as to make temporary repairs necessary in order to enable her to proceed to sea—it being impossible to effect complete repairs on the spot—the owner is entitled to add together the estimated cost of the temporary and complete repairs, and to give notice of abandonment if the aggregate would exceed the value when repaired (*o*).

Expenses of releasing the ship from the peril, preparatory to repairing, must be added to the expense of the repairs in estimating the cost.

Whenever, in order to render the ship navigable, it would be necessary, not only to repair her, but also, as a preparatory step, to incur expense for the purpose of getting her off rocks, or weighing her up, it seems clear that the estimated expense of so doing ought to be added to the estimated cost of the subsequent repairs, in order to ascertain whether the sale was a justifiable measure and the loss constructively total (*p*).

(*m*) Thompson *v.* Colvin (1830), Ll. & Wels. 140. See also Read *v.* Bonham (1821), 3 Brod. & Bing. 147; Morris *v.* Robinson (1824), 3 B. & Cr. 196; 5 D. & Ryl. 35; Cannan *v.* Meaburn (1823), 1 Bing. 243; 8 Moore, 127; Somes *v.* Sugrue (1830), 4 C. & P. 274.

(*n*) Young *v.* Turing (1841), 2 M. Gr. 593; 2 Scott, N. R. 752.

(*o*) So held in the United States, where the aggregate cost of both repairs exceeds half the value. See cases, 2 Phillips, Ins. ss. 1541, 1548. The passage in Phillips appears to have been misunderstood in former editions of this work, and was quoted in support of a proposition which the present editors are not disposed to accept. See 2nd ed. p. 1108; 6th ed. p. 1047.

(*p*) See the previous cases, espe-

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The whole estimated expense, in fact, of so treating the ship as to make her fit to navigate the seas again is that which a prudent owner, if uninsured, would take into his consideration in making up his mind whether to sell or repair, and must therefore be included in "the cost of repairs," as that phrase is employed in the rule now under discussion.

One-third new for old is not to be deducted in estimating the cost of repairs.

In estimating the probable cost of repairs, no deduction is to be made of one-third new for old. This rule, which was in accordance with the opinion of Story, J. (*q*), and was adopted by the Supreme Court of the United States (*r*), has been recently established by the Court of Appeal (*s*) in this country. It appears to follow, in principle, as a consequence from the test of constructive total loss—viz., that the point to be considered is whether a prudent owner, if uninsured, would sell rather than repair, from a calculation that the cost of repairs would exceed the repaired value. This clearly implies that all considerations as to the cost of repairs are to be disregarded, which have reference to the sum they would cost an owner if insured..

Is the expense of such repairs as the old and decayed state of the ship may have rendered necessary, to be excluded in estimating the cost?

1130. Another question has been raised, both in the United States and in this country, viz., whether, in the case of an old and decayed ship, the jury, in estimating the probable cost of repairs with a view to ascertain whether they would exceed the repaired value, are to be directed to exclude from their estimate the cost of all such repairs as the decayed state of the ship may have rendered necessary.

cially Mount *v.* Harrison (1827), 4 Bing. 388; Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48; Gardner *v.* Salvador (1831), *ibid.* 116; *S. L.* in the United States. See Bradlie *v.* Maryland Ins. Co. (1838), 12 Peters, S. C. R. 400.

(*q*) In Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, 27.

(*r*) In Bradlie *v.* Maryland Ins. Co. (1838), 12 Peters, S. C. R. 399. Phillips, in his 3rd ed. (vol. ii. s. 1543), takes the same view; in his 2nd ed. (vol. ii. s. 278), he had opposed it. So 2 Parsons, p. 129.

(*s*) In Henderson *v.* Shankland, [1896] 1 Q. B. 525. It may, however, be doubted whether the Court decided correctly in applying the rule to a case of general average. See *ante*, s. 1025.

Sect. 1130. The better opinion in the United States, and the law as settled in this country would seem to be that, if the necessity of the repairs may fairly be referred to the perils insured against, and the ship is shown or admitted to have been seaworthy when she sailed, the jury need not be told to exclude the expense of such repairs from their estimate, since, but for the casualty which caused the loss, the decayed parts of the ship might have been strong enough for the voyage.

Phillips v. Nairne. The point in our jurisprudence seems to have been first raised, but not disposed of, in the case of Thompson *v.* Colvin (*t*). It arose again in the following case:—A ship, which was admitted to be seaworthy by a clause in the policy, in the course of her homeward voyage from China to London was so much damaged by a violent hurricane, that she was obliged to put into the Mauritius; and there it appeared that, from the damage caused by the storm and the old and decayed state of the ship, she was not worth repairing. But for the storm, however, the decayed state of the ship would not have prevented her from performing her voyage in safety. The assured, who had given due notice of abandonment, claimed to recover as for a total loss. Erle, J., left to the jury the question "whether the cost of repairing the damage arising from the perils insured against would have been greater than the value of the ship when repaired," directing them, if they thought so, to find for the plaintiff. The jury having found for the plaintiff as for a total loss, a new trial was moved for, on the ground that they should have been told that, in estimating the cost of repairs, they ought to exclude from their consideration all such repairs as were made necessary by the decayed state of some parts of the ship. The Court, however, after argument, refused the rule, on the ground that the jury had been told to consider the damage done by the perils insured against as the matter on which their estimate should be founded. They added, moreover, that on a careful examination of the evidence

(*t*) (1830), Ll. & Wels. 140.

they thought no repairs were included in the estimate except such as were fairly referable to perils of the seas (*u*). Sect. 1130.

1131. The doctrine in the United States on this subject appears to agree with our own, and may be shortly stated to be that, if the ship be seaworthy for the voyage when she sailed, and repairs have been rendered necessary in the course of the voyage by the perils insured against, the increased expense of making such repairs, arising from the old or decayed state of the ship, is not to be deducted in calculating whether the cost of repairing will exceed the ship's value when repaired (or, as the rule is in the United States, half the repaired value). Doctrine in the United States as to this point.

Thus, in one American case, Livingston, J., remarked, "I adopt, as a general rule, that, if the old injuries (arising, in the particular case, from the ship's bottom being worm-eaten when she sailed) are not such as to make the ship innavigable (unseaworthy), no deduction is to be made on that account from the cost of repair" (*x*). And in another case the Court said that the objection could be made only in reference to the seaworthiness of the ship at the commencement of the voyage (*y*); in a third case the rule is stated to be, "that in case an injury is received by an old and decayed vessel which, independent of the accident, might have run some time; if the repairs cannot be put on her so that the unsound part can be used as formerly, without an expense equal to one-half her value (in our law it would be exceeding her value when repaired), or, in other words, where the injury which the underwriters are obliged to make good is the cause of the decayed parts requiring repairs, that then the assured may abandon; but if repairing the injury, which has arisen from one of the perils insured against, will replace her in the same situation she was in before, no matter how unsound all

(*u*) Phillips *v.* Nairne (1847), 4 C. B. 343; 16 L. J. C. P. 194.

(*x*) In Depeyster *v.* Col. Ins. Co. (1804), 2 Caines, 85; 2 Phillips, s. 1547.

(*y*) Depau *v.* Ocean Ins. Co. (1825), 5 Cowen, 63.

Sect. 1131. her other parts may be, then the insured shall not have this right, for all that they can ask is that the ship may be placed *in statu quo*" (*z*).

General result of the authorities as to this point.

1132. The rule, therefore, on the whole appears to be this: If the ship was seaworthy when she sailed, the assured may abandon and recover for a total loss wherever, by the perils insured against, the ship is so damaged that she cannot be rendered navigable again, except at a cost greater than her repaired value; and in estimating such cost no deduction is to be made for the increased expense of repairs, arising from her age or state of decay. If, however, she can be repaired so as to keep the sea at a less cost than her repaired value, the assured cannot elect to abandon merely because, owing to her decayed condition, the expenses of complete repairs would be greater than this.

Where operations are for recovery of cargo as well as ship.

In case the ship is stranded or sunk, with cargo on board, and the operations to recover her are applicable equally to the cargo, so that the expense becomes general average, that proportion of it which falls to the account of cargo and of freight is to be deducted from the whole, and the residue only to be considered, in estimating the cost of recovery and repairs of ship (*a*).

What is the value of the ship with which the cost of repairs is to be compared?

1133. The third question relates to the value of the ship, with which the cost of repairs is to be compared. In open policies it was never doubted that by these words were meant the real value of the ship when repaired. It was, however, for some time a litigated question in English law whether the standard of comparison was the same in valued policies. It is now conclusively decided that it is.

The point first arose distinctly in Allen *v.* Sugrue (*b*), and subsequently in Young *v.* Turing (*c*). It was finally decided

(*z*) Per Porter, J., in Hyde *v.* Louisiana State Ins. Co. (1824), 2 Martin (N.S.) 410; 2 Phillips, s. 1547.

(*a*) Kemp *v.* Halliday (1865), 34 L. J. Q. B. 233; L. R. 1 Q. B. 520 (Exch. Ch.). As to American law, cf. 2 Phillips, s. 1545.

(*b*) Allen *v.* Sugrue (1828), 8 B. & Cr. 561; 3 M. & Ryl. 9; *S. C.* at N. P., Dans. & Ll. 188.

(*c*) Young *v.* Turing (1841), 2 M. & Gr. 593; 2 Scott, N. R. 752.

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The real value of the ship when repaired is the true test, and not the value in the policy. Manning *v.* Irving.

by the House of Lords in Irving *v.* Manning (*d*). In that case an East Indiaman, while lying in Madras Roads in the course of her voyage, was carried out to sea in ballast by a violent hurricane, and was brought into Calcutta so damaged that the cost of repairs would have been 10,500*l.*, and her marketable value when repaired would only have been 9,000*l.*, either in England or at Calcutta. The latter sum was also her marketable value at the time of effecting the policy and immediately before the casualty; she was, however, valued in the policy at 17,500*l.* The ship was neither repaired nor sold, but still lay at Calcutta *in statu quo* at the time of action brought. The owner gave notice of abandonment and claimed to recover as for a total loss; and the jury found a verdict for the full amount of the insurance, subject to a special case, in which the question for the Court was, whether under the circumstances the defendants were liable as for a total loss. In the course of arguing the special case, it was suggested by the counsel for the defendants that, though the marketable value of the ship when repaired was only, as stated, 9,000*l.*, yet her worth to her owners (*e*) was more, and in fact greater than the estimated cost of the repairs, and that therefore the Court could not infer that they, as prudent men, if uninsured, would not have repaired. In answer to this argument, Cresswell, J., said that the question was not whether the plaintiffs, if uninsured, would have repaired, but whether a prudent owner would have done so abstractedly from any particular fancy; and the Court being of opinion that the facts clearly showed that a prudent owner, if uninsured, would in this case not have repaired, gave judgment for the plaintiffs (*f*). The special case was then turned into a special verdict, with the additional finding "that a prudent owner, if uninsured, would not have repaired the

Her worth to her owners.

(*d*) Irving *v.* Manning (1847), 1 C. B. 168; 2 C. B. 784; 1 H. L. Cas. 817.

(*e*) As to the value of a peculiarly built ship to her particular owners, see *post*, s. 1135, and Grainger *v.* Martin, there cited.

(*f*) Manning *v.* Irving (1845), 1 C. B. 168.

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vessel"; and in this state the Court of Exchequer Chamber, on the authority of Allen *v.* Sugrue and Young *v.* Turing, affirmed the judgment of the Court below (*g*). Finally it was carried into the House of Lords, and there argued by the counsel for the underwriters, mainly on the ground that if the owners, under the circumstances, were allowed to recover under the policy the full amount of 17,500*l.*, the first principle of insurance law — that the policy is a contract of indemnity only—would be overturned. The opinion of the Judges on the point, having been requested by their Lordships, was delivered by Patteson, J. After stating that, had this been the case of an open policy, the assured would, under the circumstances, have been entitled to recover as for a total loss—the amount to be ascertained by evidence—his Lordship proceeds as follows:—

The valuation only settles the amount payable by underwriters.

"What difference, then, is there from the circumstance that the policy is a valued policy? By the terms of it 'the ship, &c., for as much as concerns the assured, by agreement between the assured and assurers, are and shall be rated and valued at 17,500*l.*,' and the question turns upon the meaning of these words. Do they, as contended for by the plaintiff in error (the underwriters), amount to an agreement that, for all purposes connected with the voyage, at least for the purpose of ascertaining whether there is a total loss or not, the ship should be taken to be of that value, so that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired; or do they mean only that, for the purpose of ascertaining the amount of compensation to be paid to the assured, when the loss has happened, the value shall be taken to be the sum fixed, in order to prevent disputes as to the quantum of the assured's interest? We are all of opinion that the latter is the true meaning; and this is consistent with the language of the policy, and with every case that has been decided upon valued policies." His Lordship then, after

(*g*) Irving *v.* Manning (1847), 2 C. B. 784.

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taking a view of the cases cited in argument, especially Allen *v.* Sugrue and Young *v.* Turing, thus continued: "The principle laid down in these latter cases is this—that the question of loss, whether total or partial, is to be determined just as if there were no policy at all, and the established mode of putting the question, when there has been what is perhaps improperly called a constructive total loss of a ship, is to consider the policy as altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against; if he would not have repaired the vessel, it is deemed to be lost. When this test has been applied, and the nature of the loss has been thus determined, the quantum of compensation is then to be fixed.

In determining the question whether the loss be total or partial, the policy is considered as altogether out of the question.

"In an open policy the amount of compensation must be then ascertained by evidence; in a valued one the agreed total value is conclusive: each party has conclusively admitted that this fixed sum shall be that which the assured is entitled to recover in case of a total loss.

"It is argued that this course of proceeding infringes on the generally received rule that an insurance is a mere contract of indemnity, for that thus the assured may obtain more than a compensation for his loss, and it is so. A policy of insurance is not a perfect contract of indemnity; it must be taken with this qualification—that the parties may agree beforehand in estimating the value of the subject insured by way of liquidated damages, as indeed they may in other contracts to indemnify."

A policy of insurance is not a perfect contract of indemnity.

The House of Lords affirmed the judgment of the Courts below, with costs (*h*).

1134. The principle thus fixed by the highest authority in this country had some time previously been established by the Supreme Court of the United States, the only difference being that in America the loss is held constructively total when

Same doctrine in the United States.

(*h*) Irving *v.* Manning (1847), 1 H. L. Cas. 817.

Sect. 1134. the cost of repairs exceeds half the repaired value. The rule is thus expressed by Story, J., in giving the judgment of the Supreme Court: "that if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of repairs, double the cost of repairs (with us it would be 'the cost of repairs'), it is to be treated as a technical total loss" (*i*).

Special clause. In consequence of the establishment of this doctrine in the United States, it became usual in the Boston policies to insert a special clause "that the assured should not have a right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss should exceed half the amount insured" (*k*).

Institute Clause. And similarly in this country it is now provided by the Institute Clauses that the insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss. And most of the insurance clubs have a clause barring claims for a constructive total loss unless the estimated cost of the repairs, &c., is equal to 80 per cent. of the value declared in the policy, although the value of the ship when repaired may be less than the cost of the repairs.

In case of a peculiar ship. **1135.** In the case of an ordinary ship suitable for trade in general, her selling price or market value seems to be a reasonable standard to use, in making comparative estimates on this question of a constructive total loss. But in the case of a peculiar and exceptional vessel, specially built for her owners with a view to a particular trade, it is obvious that her value to sell in the general market would be a very

(*i*) Bradlie *v.* Maryland Ins. Co. (1838), 12 Peters, S. C. R. 398; Patapsco Ins. Co. *v.* Southgate (1831), 5 Peters, S. C. R. 604; cited 2 Phillips, s. 1539. This point has been decided the other way by the Supreme Court of Massachusetts. Phillips, *ibid.*

(*k*) Phillips, *qud supra*. It was, perhaps, the intention of the defendants in Forwood *v.* North Wales Ins. Co. (1880), 9 Q. B. D. 732, to protect themselves in a similar manner. The Court, however, held that they had not succeeded in doing so.

erroneous test. Wood, V.-C., dealing with this question, *alio intuitu*, says: "The sum which the ship would have sold for cannot in all cases be the true criterion of its value. Cases might arise in which to adopt that criterion would lead to undue depreciation. A particular class of ships might be adapted for one particular description of traffic and for that alone; and that description of traffic might be entirely occupied by one company with which it might be hopeless to compete, so that there would be no market for a ship of that particular description. If such a case should ever occur, it would be necessary for the Court to adopt some other criterion. One, I venture to suggest, might be to ascertain the price given for the ship and the subsequent deterioration. Some such criterion would have to be adopted, for otherwise the value of the ship would be what the ship would sell for to be broken up" (*l*). Sect. 1135.

Such a case as the learned Vice-Chancellor supposed has arisen under a claim against underwriters as for a total loss. The owners had purchased the "Acadia," a vessel of exceptional size and class, for 20,000*l.*, and were employing her at the time when she was obliged by sea perils to take refuge at the Mauritius, so damaged that the necessary repairs were estimated at 10,500*l.* She would have sold in the general market, when thus repaired, for 7,500*l.*; her value to sell when the risk attached was 7,500*l.*, but in the policy was fixed at 17,000*l.*; the arbitrator, however, found that 20 per cent. would have been a fair deduction from the cost price for wear and tear, at the date of the policy. She was sold at the Mauritius unrepaired, and realized 1,350*l.* gross. The arbitrator further found as a fact that "an owner wanting such a ship for the particular purposes of his trade at the time when the 'Acadia' was sold, and having to elect to sell, to repair or to purchase, would have elected to repair—for such a ship could neither have been built nor purchased at that time for Grainger *v.* Martin.

(*l*) Per Wood, V.-C., in the African Steam Ship Co. *v.* Swanzy (1856), 2 K. & J. 664, a case arising under the limited responsibility sections of the Merchant Shipping Act, 1854.

Sect. 1135. so small a sum as 10,500*l.*" The Court below, being empowered to draw inferences of fact, inferred that the actual owners, as they were employing the ship at the time, were such owners as the arbitrator here supposed would have preferred repairing, and therefore held that the plaintiffs had failed to prove a constructive total loss (*m*). This judgment was affirmed by the Court of Error (*n*).

Effect of sale of damaged vessel by holders of bottomry bond.

1136. The mere fact that a vessel, after suffering damage which has been repaired by the master abroad on bottomry, is sold on arrival at her port of destination at the instance of the bond-holders and realizes less than enough to satisfy their claims, is not sufficient to constitute a constructive total loss (*o*). Where, however, the underwriters have dissuaded the assured from persisting in his intention to abandon, and themselves ordered the repairs, they will be liable as for a total loss if, on the ship's subsequent arrival in port charged with a bottomry lien for the repairs, they refuse to discharge the bond and allow her to be sold to satisfy the claim of the obligees (*p*).

What kind of necessity will justify the master in resorting to a bottomry bond.

As to the kind of necessity that will justify the master in raising money for repairs on bottomry, it has been laid down by Story, J., in a most elaborate and learned judgment, that there must not only be a necessity for the repairs, but also a necessity of resorting to bottomry as the sole means of defraying them; and that it is only when this is the only or the least disadvantageous mode of borrowing, that the master is at liberty to avail himself of it as a *dernier ressort* (*q*).

(*m*) Grainger *v.* Martin (1862), 2 B. & S. 456.

(*n*) In error, 4 B. & S. 9. Martin, B., and Keating, J., however, dissented.

(*o*) This seems to follow from the decision in Benson *v.* Chapman (1849), 6 M. & Gr. 792; Chapman *v.* Benson (in error), 5 C. B. 330; 2 H. L. 696—where the question, however, was as to a total loss of freight, not of ship. Cf. 2 Phillips, ss. 1554, 1558.

(*p*) Da Costa *v.* Newnham (1788), 2 T. R. 407; Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, 27, per Story, J. See 2 Phillips, s. 1557.

(*q*) Judgment of Story, J., in the case of the Ship Fortitude (1838), 3 Sumner, R. 228.

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In short, as Chancellor Kent states the result of the case, good faith and an apparent necessity under the exercise of the master's judgment at the time are sufficient to justify a bottomry bond (*r*).

The doctrine of constructive total loss does not apply to contracts or insurances on bottomry.

1137. It should be added that the doctrine of constructive total loss is not applicable to contracts of bottomry, nor to policies effected on bottomry loans. If the ship exist in specie, though in a state which would warrant an assured on ship to abandon, as where the cost of repairs would greatly exceed her value when repaired, the assured on bottomry cannot recover; for the ship must be absolutely and totally destroyed in order to discharge the borrower (*s*): *à fortiori*, capture producing merely a temporary retardation of the voyage, and followed by restoration before action brought, will not discharge him (*t*). On the other hand, so long as the ship exists in specie the claim of the bottomry bondholders to the salvage will prevail over that of the underwriters on ship to whom she has been abandoned, and such claim will be allowed to extend to the whole salvage, whatever may have been the sum advanced on bottomry (*u*).

Constructive total loss on goods in cases of capture, &c.

Capture, &c. is *primâ facie* a constructive total loss on goods.

1138. Capture, arrest, or embargo, if likely to be of long continuance (*x*), barratrous seizure, or total desertion at sea by the crew—any forcible dispossession, in short, or effective privation of the control over his property—gives a *primâ facie* right of abandonment to the assured on goods, just as in the case of the ship.

Capture, followed by confiscation or by unpreventable sale and unredeemed by any restoration of the goods or their proceeds before action brought, is, as we have already seen, a

(*r*) 3 Kent, Com. 163, note.

(*s*) Thompson *v.* Royal Exch. Ass. Co. (1813), 1 M. & S. 30; Broomfield *v.* Southern Ins. Co. (1870), L. R. 5 Ex. 192.

(*t*) Joyce *v.* Williamson (1783), 2 Marsh. Ins. 760.

(*u*) Stephens *v.* Broomfield (1869), L. R. 2 P. C. 516. So in America Ins. Co. *v.* Gossler (1877), 96 U. S. 645.

(*x*) Cf. Rodocanachi *v.* Elliott (1873), L. R. 8 C. P. 649; 9 C. P. 518.

Sect. 1138. case of total loss in goods, without notice of abandonment [y].

If, however, after capture, or even after capture and condemnation, the goods subsist in specie, and there is any manner of restitution either of the goods themselves or their proceeds by the issue of any pending negotiation, the assured cannot recover as for a total loss without notice of abandonment [z].

There never can be at the same time of capture and restitution the assured cannot abandon.

If, after capture and before notice of abandonment, a final decree of restitution has been made, it has been held in the United States, and no doubt would be so in this country [a], that the assured on goods cannot, in bearing at one and the same time of the capture and the decree of restitution, give notice of abandonment which can not in fact have been at that time actually restored to him, for there is then no such prospect that the loss as to him will be eventually total as to justify a notice of abandonment [b]; and the case is the same where notice of abandonment has been given after the final decree of restitution was in fact made, but before the assured had heard of it [c].

So if, after notice and before action brought, captured goods are restored, the right to recover as for a total loss is divested.

1139. But although a *prima facie* right of abandonment may have been duly exercised by giving notice of abandonment when the circumstances justified it, still the right of the assured to recover as for a total loss depends, in this country, as in the case of the ship, upon the ultimate state of the property at the time of action brought; if before that time the goods, after capture and recapture, have been restored to the assured, or brought into this country under such circumstances that he may, if he pleases, take possession of them,

[y] Mullett *v.* Shedden (1811), 13 East, 204; Mellish *v.* Andrews (1812), 15 East, 13; Stringer *v.* English, &c. Ins. Co. (1869), L. R. 4 Q. B. 676; 5 Q. B. 599.

[z] Tunno *v.* Edwards (1810), 12 East, 488. Cf. Goldschmid *v.* Gillies (1813), 4 Taunt. 802.

[a] See Barker *v.* Blakes (1808), 9 East, 283.

[b] Adams *v.* Delaware Ins. Co. (1811), 3 Binn. 287, cited 2 Phillips, s. 1662. Cf. Hamilton *v.* Meades (1761), 2 Burr. 1210.

[c] Marshall *v.* Delaware Ins. Co. (1808), 4 Cranch, 202, cited Phillips, *ubi supra*; Bainbridge *v.* Neilson (1808), 10 East, 329.

and may reasonably be expected to do so, his right to recover as for a total loss will be thereby divested (*d*). Sect. 1139.

Thus where, after seizure of the ship for breach of blockade, and subsequent rescue by the master and crew, the goods were brought back to their home port of loading in this country, and there warehoused, so that the assured might have had possession of them on paying the salvage expenses, but instead of doing so he let them remain where they were, and, relying on a previous notice of abandonment, brought his action for a total loss—Lord Tenterden and the Court of King's Bench held that he could not recover, as the loss had in fact ceased to be total before action brought (*e*). Naylor *v.* Taylor.

1140. Yet the mere fact that the goods are restored, or subsist in specie, before action brought, is not of itself sufficient, irrespective of all considerations as to the circumstances under which the restoration takes place, to deprive the assured, who has once justifiably given notice of abandonment, of his right to insist on such notice and recover as for a total loss. The mere fact, however, of restoration, or subsistence of the goods in specie before action brought will not *per se* divest the right to recover as for a total loss.

A ship timber-laden, insured from Sierra Leone to this country, was barratrously seized by her crew and carried off to Barbadoes, where the ship and part of the cargo were sold (but not for or on account of the assured) to defray the expenses incurred there; the remainder of the timber (186 logs out of 233) was afterwards forwarded to this country by another ship, but not by the directions of the assured or any person authorized by him, and it was sold in this country, but not by him or his orders. After this, having given due notice of abandonment on first hearing of the casualty, he brought his action for a total loss. The Court held this to be a clear case of constructive total loss. "Here," said Lord Tenterden, "by the fraud and barratry of the master and mariners, the Dixon *v.* Reid.

(*d*) All the cases on this subject are reviewed by Collins, J., in Ruys *v.* Royal Exchange Ass. Corp., [1897] 2 Q. B. 135. They have already been more particularly referred to in this chapter, in dealing with constructive total loss of ship.

(*e*) Naylor *v.* Taylor (1829), 9 B. & Cr. 718; 4 M. & Ryl. 526; *S. C.* at N. P., Dans. & Ll. 240.

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cargo was taken out of the possession of the assured. From that time it became to him a total loss. The payment of the wages at Barbadoes and the sending home the 186 logs were not acts of the assured or of any person authorized by him" (*f*).

Parry *v.* Aberdein.

So where, after desertion of the ship by the crew, and notice of abandonment duly given, the goods were many months after the loss delivered to the agents of the assured abroad before action brought, but in such a state of damage that they would have been worthless if sent on to their port of destination, even had there been a ship to take them on, which there was not; and they were consequently sold at the foreign port for less than the expenses of salvage—this was held not to be such a restoration of the goods as to prevent the assured from insisting on his abandonment, and recovering as for a total loss (*g*).

The ground of decision in this case was that the total loss occasioned by the desertion of the ship by the crew had never ceased to be a total loss as to the goods. "Can any person say," asks Lord Tenterden, "that the goods, although remaining in specie, were not as effectually lost to the assured, when the ship was deserted, as if they had then gone to the bottom of the sea, or that the subsequent events produced a restoration of them to the owners?" (*h*).

A fortiori if there be no restitution.

1141. Still less doubt will there be if, after capture, seizure, or arrest, followed by recapture, decree of restitution, &c., the goods never have been effectively restored to the possession or within the means of possession of the assured before action brought; the loss once total continues total, as to the assured, down to the time of action brought.

"If, before action brought," said Lord Campbell (*i*), "the

(*f*) Dixon *v.* Reid (1822), 5 B. & Ald. 597; 1 Dowl. & Ryl. 207.

(*g*) Parry *v.* Aberdein (1829), 9 B. & Cr. 411; 4 M. & Ryl. 343.

(*h*) Parry *v.* Aberdein (1829), 9 B. & Cr. at p. 416.

(*i*) In delivering the judgment of the Court in Lozano *v.* Janson (1859), 28 L. J. Q. B. 337, 343; 2 E. & E. 100. See the judgment in Dean *v.* Hornby (1854), 3 E. & B. 190.

goods had been restored to the assured, or he had the means of getting possession of them under such circumstances as ought to have induced a prudent man to take possession of them, his claim could now only have been made for a partial loss. It has often been held, that if the ultimate consequence of a peril insured against is merely the loss of a voyage, or a suspension or retardation of a mercantile adventure, although a notice of abandonment had been justifiably given, a total loss cannot be claimed. But the mere existence of the ship or goods insured, after a total loss and abandonment, so that possession of them may possibly be resumed by the owner, will not reduce it to a partial loss: McIver *v.* Henderson (*k*), and Cologan *v.* The London Assurance Company (*l*). The true rule seems to us to be laid down by Bayley, J., in Holdsworth *v.* Wise (*m*), that the subject of the insurance must be in 'existence under such circumstances that the assured may, if they please, have possession and may reasonably be expected to take possession of it.'" Sect. 1141.

A ship, with a cargo of wheat insured "free of average" from Quebec to Teneriffe, was captured and recaptured and taken into Bermuda, where part of the wheat was thrown into the sea as putrid. As to the rest, an embargo on all provisions in Bermuda (owing to a scarcity of food there), prevented the captain from forwarding it to Teneriffe, and he consequently offered it for sale at Bermuda. Owing to the low price bid, he bought it in for his owners and wrote to England to inform them of what had passed. On receipt of this letter the assured gave immediate notice of abandonment. Subsequently the captain, by leave, carried it to Madeira, sold it there, and took in a cargo of wine, with which he arrived in England before action brought. The assured, relying on their previous notice of abandonment, brought their action for a total loss, and the Court held, under the circumstances, Cologan *v.* London Ass Co.

(*k*) (1816), 4 M. & S. 576. (*l*) (1816), 5 M. & S. 447.
(*m*) (1828), 7 B. & Cr. 798.

Sect. 1141. that they had a right to recover the whole amount claimed (*n*).

Bayley, J., puts the case in a very clear light: "The destination is to Teneriffe; the ship, with the cargo, in her course thither, is captured; recapture follows, but not so as to enable the ship to proceed to Teneriffe, for she is sent to Bermuda, where she is placed under an embargo, from which she is never released, except upon condition of altering her destination to Madeira. Therefore there has been no restitution of any part of the cargo, as it regards the risk insured to Teneriffe" (*o*).

Loss of voyage may effect constructive total loss of goods.

1142. An insurance on goods is a contract to indemnify the assured for any loss he may sustain by his goods being prevented, by the perils of the seas, from arriving in safety at their port of destination (*p*). If, therefore, the assured has given notice of abandonment at a time when the loss was total by the forcible dispossession of all control over his goods, he will not be precluded from afterwards recovering as for a total loss, by their being restored to him, before action brought, under circumstances which make it utterly hopeless for him ever, or within any assignable period, to procure their arrival at their destined port. Loss of the voyage in this sense, *i.e.*, a practical and effective impossibility of ever sending the goods on to their port of destination, is, if caused by the perils insured against, a constructive total loss on goods, though as we have already seen it would not be so on the ship. This complete hopelessness of ever bringing the adventure on the goods to a successful termination—this forced termination of the risk by the perils insured against—is carefully to be distinguished from that mere temporary retardation of the voyage for the season which, as we shall see hereafter, gives in itself no right of abandonment of goods except where, being perishable and sea-damaged, it

(*n*) Cologan *v.* London Ass. Co. (1816), 5 M. & S. 447.

(*o*) *Ibid.* 456.

(*p*) Per Bayley, J., 5 M. & S. 455; per Lord Abinger in 3 Bing. N. C. 278.

is impossible to send them on in the same or any other ship, and therefore necessary to sell them at the port of casualty. Sect. 1142.

1143. The following case is an illustration of the above principles:—

An American (neutral) ship, having on board a cargo of oil insured from New York to Havre, was seized on her voyage by a British cruiser, and carried into Bristol on suspicion of having enemy's goods on board. While she was there detained, the British government declared the port of Havre to be in a state of blockade, and it so continued from that time until the commencement of the action. Some time after this, a decree having been made for the restoration of the oil to the assured, it was given up to their agents in this country, who applied to the captain of the ship to reload and carry it on to Havre, which, however, he absolutely refused to do, and sailed away to New York, leaving the oil behind him in Bristol, where it was sold without prejudice to the rights of the parties. After this the assured brought his action for a total loss. He failed in the action because his agents had not given notice of abandonment till too late; but had the notice been duly given, Lord Ellenborough intimated that he might have recovered what he claimed, on the ground that although the goods themselves had been ordered to be restored and were capable of being so, yet "the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged detention of the ship and cargo, may be properly considered as a loss of the voyage; and such loss of voyage, upon received principles of insurance law, as a total loss of the goods which were to have been transported in the course of such voyage" (*q*). Barker *v.* Blakes.

This case in fact shows what Lord Ellenborough stated to be the true doctrine on another occasion, that a total loss

(*q*) Barker *v.* Blakes (1808), 9 East, 283.

Sect. 1143. of the cargo may be effected by a total and permanent incapacity in the ship to perform the voyage, for that is a destruction of the contemplated adventure (*r*).

Lozano *v.* Janson.

The facts of Lozano *v.* Janson, the judgment in which case has already been referred to, were as follows:—A vessel was boarded on the coast of Africa as a slaver by a British cruiser, and was carried, with her cargo, the subject of insurance, to St. Helena, where both ship and cargo were condemned by the Vice-Admiralty Court in the year 1854. The cargo was unloaded, such of it as was perishable was sold, and the rest stored on the island pending an appeal to the Privy Council in England. Possession of the goods could not be obtained at all until December, 1856, and then only on too stringent terms as to giving bail, which the owners refused to comply with. The insurance was on cargo at and from London to Ambriz or Loanda on the coast of Africa. The sentence of condemnation was reversed in 1858, and the assured, who had given notice of abandonment in due time, was held by the Court of Queen's Bench, in 1859, entitled to recover as for a total loss (*s*).

Constructive total loss on goods: where they are sea-damaged, and cannot be forwarded—right of master to sell the cargo.

Perishable goods.

1144. An insurance upon a cargo for a particular voyage contemplates that the voyage shall be performed with that cargo (*t*). Hence, where the original ship is disabled in the course of the voyage, and no other can be procured at the port of the casualty or any neighbouring port, the master has a right, where the cargo is of a perishable nature and sea-damaged, to sell it at such port for the benefit of all con-

(*r*) In Anderson *v.* Wallis (1813), 2 M. & S. 240. So also per Bramwell, B., in delivering the judgment of the Exch. Chamber in Rodocanachi *v.* Elliott (1874), L. R. 9 C. P. at p. 522.

(*s*) Lozano *v.* Janson (1859), 2 E. & E. 100; 28 L. J. Q. B. 337.

(*t*) Per Lord Ellenborough in delivering the judgment of the Court in Anderson *v.* Wallis (1813), 2 M. & S. at p. 247. Per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. at p. 278. "The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination."

cerned, and the assured on goods in like case may abandon (*u*), and recover as for a total loss. Where, however, the original ship can be repaired, with any prospect of sending on the cargo, or what remains of it, in a marketable state to its port of destination, or where another ship can be procured, either at the same or a contiguous port, without any very extraordinary delay or sacrifice, the master is at all events empowered, if not bound, to send it on, and he certainly has no right in such case to sell, nor can the assured on goods abandon and recover as for a total loss (*x*). Sect. 1144.

1145. If the cargo be imperishable, or, though perishable, not so sea-damaged as to be in danger of being spoiled or destroyed by the delay, the mere impossibility of repairing the original ship or procuring another in time to send on the cargo *so as to save the season*, will not entitle the master to sell, nor the assured on abandonment to recover as for a total loss; mere loss of the voyage for the season is never a constructive total loss on imperishable goods, and can only become so in the case of perishable goods, when they are so sea-damaged that to keep them till they can be sent on would involve their being destroyed, or rendered worthless for all merchantable purposes. If indeed a perishable cargo is reduced by sea-damage to such a state at the intermediate port, that, if sent on to its port of destination, it would perish before arriving there from the progress of rapid putrefaction, the master is justified in selling, and the assured may recover a total loss even without notice of abandonment, although the original ship may not be disabled, but capable of being repaired so as to take on the cargo. Imperishable goods.

The test, however, of what a prudent owner uninsured would have done under the circumstances, is not applicable to

(*u*) If the goods are sold, notice of abandonment is unnecessary. Farnworth *v.* Hyde (1865), 18 C. B. (N. S.) 835; L. R. 2 C. P. 204. Cf. Roux *v.* Salvador (1836), 3 Bing. N. C. 266; Rankin *v.* Potter (1872), L. R. 6 H. L. 83.

(*x*) Meyer *v.* Ralli (1876), 1 C. P. D. 358.

Sect. 1145. the case of goods sold abroad, at all events where the insurance is "free of average." Nothing under such a policy will make the underwriter liable as for a total loss on memorandum articles, except (1) the impossibility of sending them on so as to arrive in specie, or (2) the impossibility of sending them on except at a cost greater than their saleable value on arrival (*y*).

Loss of voyage for season.

1146. The Court of King's Bench in the time of Lord Mansfield—proceeding on the doctrine that loss of the voyage, by which expression he appears to have understood the voyage by the particular ship or for a particular season, was loss of the subject insured—gave certain decisions which probably would not now be upheld. Thus in one case, where insurance was on "ship, freight, and cargo, from Tortola to London," and the ship soon after sailing put back into Tortola irreparably damaged, Lord Mansfield allowed the assured to retain their verdict for the whole amount insured, though the greater part of the cargo (sugars warranted free of average) might have been sent on from Tortola to London by other ships then in the harbour. One ground of decision was that the whole cargo could not be sent on (*z*). In another case the decision was that a perishable cargo (also sugars), having after capture of ship been brought by recaptors, during the existence of an embargo there, into a foreign port where, there being no storehouses, it must necessarily have been kept six months on board a leaky ship, was justifiably sold by the master so as to cast a total loss on the underwriters (*a*).

Mere retardation or loss of the voyage for the season is never a con-

1147. In both these cases Lord Mansfield lays considerable stress upon the loss of the voyage for the season, as one of the criteria for determining whether the sale was justified and

(*y*) Navone *v.* Haddon (1850), 9 C. B. 30; Reimer *v.* Ringrose (1851), 6 Exch. 263; Rosetto *v.* Gurney (1851), 11 C. B. 176; Farnworth *v.* Hyde (1866), 18 C. B. (N. S.) 835; on appeal, L. R. 2 C. P. 204.

(*z*) Manning *v.* Newnham (1782), 3 Dougl. 130.

(*a*) Milles *v.* Fletcher (1779), 1 Dougl. 232. This case may perhaps be justified on the facts, though not on the grounds, of the decision.

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the loss constructively total. The two following cases, however, clearly establish the position that the mere loss or retardation of the voyage for the season, owing to the disability of the original ship and the impossibility of at once procuring others to forward the cargo, never gives the right of sale or abandonment in the case of imperishable goods, and only does so in the case of perishable commodities when, from the sea-damage they have already sustained, it appears in the highest degree probable that they will be totally destroyed or spoiled as merchantable articles, if kept at the port of distress till they can be forwarded. In this latter case the master may sell, and the assured abandon, not because the voyage has been lost or retarded, but because, in the language of Lord Ellenborough, "the goods themselves have received some material damage operating a destruction of the thing insured" (*b*).

Constructive total loss on imperishable goods, and only so on perishable goods when they are so sea-damaged that they may be spoiled if kept till they can be forwarded.

"Copper, iron, and nails" were insured "free of average" from London to Quebec. The ship, which sailed late in the autumn, was compelled by tempestuous weather to put back and run into the port of Kinsale, where she was surveyed, and found to be so damaged that she could not be repaired in time to reach Canada that season; nor could any ship be procured either in Kinsale or Cork in which to send on the cargo, till the next spring. On the result of the survey being known, the assured gave notice of abandonment, and the cargo, which had been only damaged to a very trifling extent, was sold at Kinsale by their orders. The Court held, on the principles already indicated, that under these circumstances the assured could not recover as for a total loss, for this was a mere temporary retardation of the voyage, not at all tending to the destruction of the thing insured (*c*).

Anderson *v.* Wallis.

1148. And the decision of the Court was the same in the following case, where the thing insured, though perishable in its

Hunt *v.* Royal Exch. Ass. Co.

(*b*) 5 M. & S. 55.

(*c*) Anderson *v.* Wallis (1813), 2 M. & S. 240.

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own nature, was yet not in fact so sea-damaged as to render it likely to be spoiled, if kept till it could be forwarded. The insurance was on flour (*d*), warranted free of average, from Waterford to St. John's, Newfoundland. The ship had sailed in October, and was compelled to put back into Cork, so disabled as to be obliged to be broken up and sold. The flour was found to be very little damaged, and might have been safely kept at Cork till the spring, to be forwarded then to its destination. Instead of so keeping it, however, the assured had it sold, and, having given notice of abandonment, claimed to recover as for a total loss. The Court, as in the last case and upon the same grounds, held that the loss was only partial (*e*). "Here," said Lord Ellenborough, "was a retardation of the adventure only; it is stated that the cargo could not have been forwarded before the next spring; that is, it might have gone then, for it must be presumed that at such a port as Cork there would be found some vessel for the next season, to forward the cargo to St. John's. I cannot necessarily infer that the flour would be changed in quality and condition by the delay from November to April, so as to incur any material damage operating a destruction of the thing insured" (*f*).

Van Omeron v. Dowick.

On the same principle, where a case of cutlasses was sold by the master at an intermediate port, from the impossibility, owing to contrary winds and the necessity of keeping with convoy, of carrying them on in his own ship to their port of destination, this sale was held not justified (*g*); and the decision was the same where a cargo of "crates, earthenware, and Indian blues," destined for the African trade, was sold by the master at the Bermudas (whither his ship had been carried after capture and recapture), because he had lost all his boats,

Wilson v. Millar.

(*d*) Pork was also included in the policy; but as to it no question was made. "This must be considered as a policy on flour only (for the pork is out of the question), warranted free of average": per Lord Ellenborough, 5 M. & S. 55.

(*e*) Hunt *v.* Royal Exch. Ass. Co. (1816), 5 M. & S. 47.

(*f*) 5 M. & S. 55.

(*g*) Van Omeron *v.* Dowick (1809), 2 Camp. 41.

which are necessary for the barter trade, and could not get a sufficient complement of hands (*h*). Sect. 1148.

On the same ground it was held that underwriters on goods insured from London to Demerara were not liable as for a total loss, where the ship, being captured and recaptured, was sent into St. Thomas, stript of all her hands, and the captain, not being able on his arrival there to procure a fresh crew, or otherwise to raise money to pay the salvage, upon this ground immediately (within three days of his arrival) sold the ship and cargo, and broke up the adventure (*i*). Lord Ellenborough remarked that, although he could not at first procure a competent crew, he ought to have waited a reasonable time: ships that came in might have spared him assistance, or seamen might possibly have been obtained from the neighbouring island. "It does not satisfactorily appear that he might not have raised the money by drawing on his owners or hypothecating the ship. Even if the ship was prevented from completing the voyage, it does not appear that the goods might not have been forwarded to their place of destination by other vessels." Underwood *v.* Robertson.

A cargo of wheat was insured "free of average" from London to Lisbon: the ship was so damaged in the Downs that she was forced to run into Dover, where, on survey, she was found to be wholly disabled from pursuing her voyage, except at a cost greater than her repaired value. The whole cargo, consisting of 1,160 quarters, having been landed, it was found that 400 only were dry, 700 were wetted, but were kiln-dried, and the residue was wholly spoiled. On this state of facts Lord Ellenborough said (in reference to the case of Manning *v.* Newnham, which had been cited as in point for the plaintiff): "I accede to that case; and if it shall be proved that the voyage here was not worth pursuing, and that there were no means of pursuing it, I think this must be considered a total loss." As, however, it appeared that at the Wilson *v.* Royal Exch. Ass. Co.

(*h*) Wilson *v.* Millar (1816), 2 Stark. 1.

(*i*) Underwood *v.* Robertson (1814), 4 Camp. 138.

Sect. 1148. time of the casualty there was a brig lying in Dover harbour, in which the wheat might have been sent on to Lisbon, Lord Ellenborough said he was clearly of opinion, on this additional evidence, that the action could not be maintained for a total loss (*j*).

Though at one time the state of the cargo be such as to justify abandonment, yet if such right be not then exercised, and part of it be afterwards recovered, the assured cannot sell and recover as for a total loss. Anderson *v.* Royal Exch. Ass. Co.

1149. The following case shows that, though at one time the state of the cargo was such as to give a right of abandonment, yet if the right be not then exercised, and any part of the cargo be afterwards recovered in such a state that it may be sent on in a marketable condition to its port of destination, and there are opportunities of so forwarding it, the assured cannot direct a sale and treat the loss as constructively total.

Part of a cargo of wheat was insured "free of average" (but without the exception, unless stranded) from Waterford to Liverpool: in going down the Waterford river the ship struck, and filled so fast that, to save her from sinking, she was run ashore on a bank, where she was completely under water at every high tide: in the course of about a month, by the exertions of the master, the whole of the cargo was got out in a sea-damaged state. Of that portion of the cargo which was the subject of the insurance, part was wholly spoiled, but about two-thirds were kiln-dried, and might have been sent on to Liverpool in a marketable state as wheat, by a vessel which sailed thither about two months after the casualty, and by which that part of the cargo which belonged to other shippers was actually forwarded. The agent of the assured, however, instead of so forwarding, sold it at Waterford; and the assured brought his action for a total loss. The question of his right to recover was considered mainly with reference to the time at which he had given notice to abandon. Lord Ellenborough, however, plainly intimated that, although the assured might have treated the case as one of total loss while the wheat remained submerged in the

(*j*) Wilson *v.* Royal Exch. Ass. Co. (1811), 2 Camp. 623. But it is doubtful whether the language here employed, or the case referred to, can be justified.

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water, yet that the loss had ceased to be total when the wheat had been in fact got out, and might have been forwarded in a marketable state (*jj*). On the same ground, in a case where the ship was wrecked at her port of loading, but her cargo, consisting of tobacco and sugars, insured "free of average," was all got on shore and saved, though in a very damaged state, but it did not appear, though the original ship was disabled and obliged to be broken up, that what was saved of the cargo might not have been forwarded in other vessels—Lord Ellenborough and the Court of King's Bench held that the assured, who had abandoned, could not recover as for a total loss (*k*).

Thompson *v.* Royal Exch. Ass. Co.

1150. The cases which we have been considering are cases where the cargo in question has sustained actual damage but where there has been a mere temporary loss of voyage. We have already seen that an insurance on goods for a voyage contemplates the arrival of the goods at their destination (*kk*). It follows that there may be a constructive total loss of goods, although the goods themselves may have suffered little or no physical damage, and although they may be actually in the possession and under the control of their owner, and although there be no physical difficulty in forwarding them to their destination, if the expenses of doing so would be so great as to make it commercially impossible for the owner to do so. If, that is to say, perils insured against have occasioned such a condition of affairs, that the expense of forwarding the goods would exceed their arrived value, then, inasmuch as it would be absurd to require their owner to spend more money on them than they would ever be worth, he may recover for a constructive total loss.

Constructive total loss where commercially impossible to forward goods.

1151. So far the law may be considered as established. The real difficulty in relation to this subject has been to ascertain what charges and expenses may be taken into account in

What expenses to be taken into account.

(*jj*) Anderson *v.* Royal Exch. Ass. Co. (1805), 7 East, 38.

(*k*) Thompson *v.* Royal Exch. Ass. Co. (1812), 16 East, 214; and see the comments of Lord Abinger on this case in Roux *v.* Salvador (1836), 3 Bing. N. C. 280; see also Navone *v.* Haddon (1850), 9 C. B. 30.

(*kk*) *Ante*, s. 1142.

[illegible]

[illegible]

The jury found as a fact that 1,000 quarters above half of the wheat might have been dried, warehoused, and sent to Liverpool in a marketable condition: and the Court held that the loss on the wheat was an average loss only if part of the cargo could have been sent on to the port of destination at less than its market value when there: but that in considering that question, the jury were bound to take into account the following items: 1. The cost of unshipping the cargo; 2. Of drying and warehousing it; 3. Of transhipping

l, *Reimer v. Ringrose* (1851), 6 Exch. 263.

m, Judgment of Common Pleas in *Rosetto v. Gurney* (1851), 11 C. B. 188.

[n] There was the usual warranty "free of average"; but as there had been a clear stranding in the course of the voyage, the clause did not apply so as to protect the underwriters from an average loss.

it; 4. The increased cost of sending it on (if it could not be forwarded on other terms) at a higher than the original rate of freight (*o*); 5. The amount of salvage allowed in proportion to the value of the cargo saved. If the aggregate of these items exceeded the selling value of the cargo at the port of discharge, then the loss would be total upon notice of abandonment. Sect. 1151.

With regard, however, to the debt and costs paid to the holders of the bottomry bond, the Court held that they could not be taken into consideration in estimating the extent (whether total or partial) of the loss (*p*). "The underwriter," as Cresswell, J., expressed it in the course of the argument, "does not insure against a loss by hypothecation" (*q*). "It is a risk," says Jervis, C. J., in delivering the judgment of the Court, "not contemplated by the policy, and which the assured must take upon himself" (*r*). Expenses of hypothecation cannot be taken into account.

1152. Some doubt existing as to the effect and limit of the rule laid down by the Court in Rosetto *v.* Gurney, especially in respect of freight, that rule was expressly reconsidered, after argument, by the Court of Exchequer Chamber in the case of Farnworth *v.* Hyde (*s*), and, in expressing their concurrence with the rule in that case as being the true rule, they said: "We are all of opinion that where goods are, in consequence of the perils insured against, lying at a place different from the place of their destination, damaged, but in such a state that they can at some cost be put into a condition to be carried to their destination, the jury are to determine whether it is practically possible to carry them on, that is, according to the well-known exposition in Moss *v.* Smith (*t*), Rule in Rosetto *v.* Gurney reconsidered and affirmed.

(*o*) If sent on in the original ship, it is on the original contract, and then nothing is to be added as an average loss; so, if transhipped at a less or the same freight; but if transhipped necessarily at a higher rate, the increase is an average loss.

(*p*) Rosetto *v.* Gurney (1851), 11 C. B. 176, 182, 190.

(*q*) Per Cresswell, J., 11 C. B. 182.

(*r*) Per Jervis, C. J., 11 C. B. 190.

(*s*) Farnworth *v.* Hyde (1866), L. R. 2 C. P. 204.

(*t*) Moss *v.* Smith (1850), 9 C. B. 94.

Sect. LXII. whether or not it will cost more than they are worth: and that in determining this the jury should take into account all the extra expenses consequent on the perils of the sea, such as buying, landing, warehousing, and reshipping the goods: but that they might not to take into account the fact that if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight originally contracted to be paid: that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not. We also agree that Rosetto v. Gurney (u) correctly decides that where the original bottom is disabled by the perils of the seas, so that the shipowner is not bound to carry the goods on, and he does not choose to do so, the jury are not to take into account the whole of the cost of transit from the place of distress to the place of destination, which must be incurred by the goods owner if he carried them on, but only the excess of that cost above that which would have been incurred if no peril had intervened."

Discussion on Farnworth v. Hyde.

1153. The decision of the Exchequer Chamber in Farnworth v. Hyde has been the subject of much discussion in recent years. It has been vigorously impugned by Lowndes (x) and by Mr. McArthur (y), but is supported by Mr. Gow (z). In order to illustrate the difficulty, it is advisable to set out the facts and figures with some particularity. The action was brought on a policy on a cargo of wood for a voyage from Quebec to Liverpool. The vessel, soon after leaving Quebec, was driven on shore about 102 miles down the river St. Lawrence, and, being a constructive total loss, was properly sold by auction for a small sum. The cargo was also sold at the same time, and the question in the case was whether the condition and situation of the cargo justified the sale, so as to entitle the assured to recover for a total loss.

(u) Rosetto v. Gurney (1851), 11 C. B. 176.
(x) Mar. Ins. s. 133.
(y) Mar. Ins. 151.
(z) Mar. Ins. 155—159.

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The evidence showed that the gross value of the cargo, if it had been sent on and had arrived at Liverpool, would have been 3,785*l.* (*a*). The freight that would have been payable to the shipowner was 1,556*l.*: so that the net value of the cargo to the merchant was 2,229*l.* The cost of sending on the cargo to Liverpool in another ship would have been as follows:—

Cost of landing	£350
Cost of reloading	700
Freight	2,552
	£3,602

So that the cost of forwarding would have exceeded the freight originally contracted for by 2,046*l.* These figures show that the sum which the cargo would have sold for at Liverpool would have exceeded the cost of forwarding by 183*l.* only; and this sum the jury and the Court of Common Pleas appear to have considered was too narrow a margin for the cargo-owner to rely upon for his profit, and a verdict for a total loss was therefore given and approved.

The Exchequer Chamber.

1154. The defendant appealed to the Exchequer Chamber, and during the argument in that Court it was for the first time suggested, by Blackburn, J., that the right question had not hitherto been considered, for that, unless the Court of Common Pleas in Rosetto *v.* Gurney had laid down a wrong rule, the proper comparison was between the extra, as distinct from the whole, cost of forwarding, on the one hand, and the gross Liverpool value, without deducting the original freight, on the other; and that inasmuch as in this case such extra cost was only 2,046*l.*, whereas the goods if they had arrived would have sold for 3,785*l.*, it was impossible to say that the jury were justified in finding that perils of the sea had

(*a*) *I.e.*, 4,300*l.* less a sum to be allowed for depreciation, as to which the Court, in dealing with the case, accepted an estimate of 515*l.*

Sect. 1154. caused a total loss. This view was eventually adopted by the Court, and the verdict for a total loss was set aside (*b*).

Farnworth *v.* Hyde criticised.

1155. Lowndes and Mr. McArthur both consider that the decision of the Exchequer Chamber in this case is based on an undeniable fallacy. "There is no total loss by sea-peril, it is argued," says Lowndes (*c*), "unless the whole value of the cargo is exceeded by the expense resulting from sea-peril: now the whole value of the cargo is its value including, or without deduction of, the freight; and the freight under the original bill of lading is not an expense resulting from sea-peril. The fallacy here is, not perhaps obvious, but undeniable when pointed out. The value of the cargo to the merchant or owner of it is not the gross proceeds, but those proceeds minus the ordinary freight. If, on the other hand, the question is as to the whole value of the cargo to *some one*, no matter whether the owner of the cargo or of the ship, then to some one the entire cost of forwarding it by another vessel, the original ship having been disabled by the perils insured against, is an expense resulting from those perils. That is to say, in computing the value, the interests of shipowner and cargo-owner are added together, but in estimating the expenses, the interest of the cargo-owner alone is looked at."

Mr. McArthur (*d*) takes the same view. "In principle, the original freight should be deducted, in the estimate both of the extra charges and of the value at destination; for the question is, whether the goods can be forwarded so as to realize some portion of their value, or whether the whole value to the owner will be absorbed by the extra cost of forwarding. The value of the cargo to the owner is not the gross, but the net value on arrival, *i.e.*, the market value at destination, less freight and ordinary sale charges. The Court of Exchequer Chamber decided, however, that to give rise to a constructive total loss, the *gross* value of the cargo must be absorbed by the extra cost of forwarding, *i.e.*, the

(*b*) The most material part of the judgment has already been cited.

(*c*) Mar. Ins. s. 133, n. (*l*).

(*d*) Mar. Ins. 151, n.

entire cost of forwarding, deducting the original freight. This decision was clearly erroneous, for the original freight may either be brought in or left out on both sides in the calculation, but cannot correctly be brought in on one side only." Sect. 1155.

1156. The rule advocated by these writers may also be supported by the following argument. The gross value of the goods at their place of destination may for present purposes be considered to consist of two items, their prime cost and the enhancement of their value by reason of their transportation. The insurable value of the goods, which is all the underwriter is deemed to be concerned with, is the prime cost of the goods, or that which by the valuation is agreed to be the prime cost. If, in considering whether there should be an abandonment of that which he has insured, the enhanced value of the goods is to be considered, the expenditure on freight to which the enhancement will be due, should be taken into consideration and deducted (*e*). It is only by the payment of the whole freight, that the goods will have the value which is the basis of the calculation in Farnworth *v.* Hyde. Further reasons against Farnworth *v.* Hyde.

It should also be borne in mind that an insurance on goods for a particular voyage is not merely an insurance of the goods against physical loss or damage. The undertaking of the underwriter is that they shall not be prevented by perils insured against from reaching their destination. If the ship by which they are insured is prevented by the perils of the voyage from bringing them to their destination, the original adventure is frustrated, and the original contract of affreightment has ceased to exist. Ought not the assured, when he is thus called upon to accept his goods at a different place, to be

(*e*) On principle it might well be argued that the assured should be entitled to abandon when the extra expenditure due to perils insured against exceeds the insurable value—*i. e.*, the prime cost or the agreed valuation. This view is, however, not supported by authority, and the editors have reason to believe that it does not find favour either with underwriters or with merchants.

Sect. 1156. entitled to abandon, when they will not be worth the cost of transportation to their destination?

This is, in effect, an application of the "prudent-uninsured-owner" principle. Suppose, for instance, that goods which will realize 1,000*l.* at their port of destination are being carried for a freight of 650*l.*, that the shipowner, owing to perils of the seas, justifiably declines to carry them beyond a port of refuge, and that it is ascertained that the goods can only be carried on to their destination by spending 500*l.* in re-conditioning, and 600*l.* for freight from the intermediate port. In such a case a prudent uninsured owner would clearly decline to take goods on further, because by doing so he would be 150*l.* out of pocket. But, according to Farnworth *v.* Hyde, there is no constructive total loss, because the increased cost, viz. 450*l.*, is less than the gross arrived value of the goods (*f*).

Moreover, if the assured cannot abandon under circumstances such as those of Farnworth *v.* Hyde, he will not be indemnified for a great part of the loss caused by perils insured against. We will take the facts and figures of that case, which have been fully set out. There was a depreciation of 515*l.*, part of which would no doubt be recoverable, except under a policy against total loss only. The cost of landing the cargo was 350*l.*, and this was probably recoverable under the sue and labour clause. But the cost of reloading was 700*l.*, and the extra freight was 1,000*l.*, and unless the decisions in Great Indian Peninsular Railway Co. *v.* Saunders (*g*), and Booth *v.* Gair (*h*) are reconsidered and overruled, neither of these items of expenditure could be recovered from the underwriter. Thus, in consequence of perils insured against, there would have been a loss of at least 1,700*l.* in carrying out the adventure, which the assured

(*f*) Mr. Gow, however, in answer to this argument, suggests that this may be only an additional instance of the inadequacy of the "prudent-uninsured-owner" theory, when applied to marine insurance problems. Mar. Ins. 159.

(*g*) (1861), 1 B. & S. 41; 2 *ibid.* 266.

(*h*) (1862), 15 C. B. N. S. 291.

would have to bear himself. When the insurance is against total loss only (and this is the only insurance which can practically speaking be effected on some kinds of goods), the hardship on the assured is obviously even greater. Sect. 1156.

1157. On the other hand, the position adopted by Messrs. Lowndes and McArthur may also in certain cases lead to surprising results. For instance, assume that the goods will realize 1,000*l.*, as before, and that the freight is 800*l.*; the voyage has to be abandoned near to the port of departure, as in Farnworth *v.* Hyde, and the goods can only be forwarded at an increased rate of freight, say 900*l.* (*i*). They are themselves, however, but little damaged, so that all extra charges, including re-conditioning, will be covered by 100*l.* Is the owner entitled to abandon? The real reason for abandonment in such a case, it may be said, would be not injury to or loss of the goods, but the high rate of freight in proportion to their value which the owner has agreed to pay. But as to this, Mr. Gow observes: "the underwriter never guarantees that cargo will be worth its freight whether it arrives damaged or sound; why should a freight obligation be imported into his contract in certain cases of damage and loss, when it is really a part of the merchant's obligations which the merchant retains at his own risk in case of arrival of his goods at destination?" Arguments in support of Farnworth *v.* Hyde.

It is clear that in the instance given the physical damage sustained by the goods would not justify abandonment. Such damage is assumed to be comparatively insignificant, and it might indeed be non-existent. Abandonment in such a case is justified, if at all, on the ground that the effect of perils insured against has been such as to render it commer-

(*i*) It is possible also that there might be no increase, and even a diminution of freight, and such diminution might more than compensate the shipper for the costs of transhipment, &c. The shipper might then be in no worse, or even in a better position as regards his cargo, owing to the loss of the ship. At the same time the market for his goods at the port of discharge may have so far fallen as to make his adventure necessarily an unprofitable one. Could this be a case of constructive total loss, by perils of the sea, of his goods?

Sect. 1157. cially impossible for the merchant to carry on the goods. A constructive total loss of goods may no doubt be constituted in this way, for it is established in the case of goods, though it is otherwise in an insurance on ship, that an insurer does undertake that perils of the sea shall not prevent the voyage from being brought to a successful termination. But, while so much is conceded, it may be urged, in support of the decision of the Exchequer Chamber in Farnworth *v.* Hyde, that adverse criticism has failed to give due weight to the consideration that a constructive total loss, for which underwriters are to be held liable, must have been due to perils insured against? So far as the freight by the substituted vessel does not exceed that which the shipper originally contracted to pay, such freight did not become payable by him by reason of any peril of the sea; it was payable in any event (*k*). The only loss occasioned by such peril is the additional amount which it becomes necessary to pay for carrying the goods in a substituted bottom. There is, therefore, force in the argument that it is only this additional amount which should be taken into consideration. "To hold otherwise," said Channell, B. (*l*), "would be to enable the assured owner of goods to bring into account the whole of the freight wherever the cost of obtaining a substituted bottom exceeded the original freight, however small the excess may be; for, in such a case, the shipowner would never carry on the goods for the purpose of earning his original freight, though he might, perhaps, do so as agent of the goods owner; whilst no part of the freight could ever be charged when the cost fell short of the original freight, in which case the shipowner would forward them. This would be a very unsatisfactory state of the law; and we

(*k*) See per Blackburn, J., L. R. 2 C. P. at p. 220, citing from Baily on Perils of the Sea. See also per Shee, J., 36 L. J. C. P. at p. 37:— "Why should the underwriter pay for freight of a new ship a sum which would have had to be paid under any circumstances? The underwriter insures not against the loss to the owner, but the loss incurred by the perils of the sea."

(*l*) In delivering the judgment of the Exchequer Chamber, L. R. 2 C. P. at p. 226.

are of opinion that the case of Rosetto *v.* Gurney (*m*), which prevents that result, was correctly decided." Sect. 1157.

Against the argument that, inasmuch as an insurance on goods for a voyage is an insurance by a particular vessel, the adventure insured is brought to an end by the loss of that vessel, and that the underwriters on the goods should therefore be liable for a total loss, it may on the other hand be said that logically this involves the proposition that whenever a voyage is frustrated by a total loss of the ship, there may be an abandonment of cargo, irrespective of all considerations as to the practicability of forwarding, which is clearly going too far.

1158. The difficulty illustrated by Farnworth *v.* Hyde is due to the fact, already indicated, that in considering whether there has been a constructive total loss of goods, regard is had not to the actual value of the goods at the port of loading, but to what would probably have been their value on arrival at their destination, had they been forwarded. It is a somewhat anomalous position that it should in this way be necessary to take into consideration a prospective hypothetical value, in order to determine whether or not an underwriter is liable to pay for an actual value in the past. It is clear, however, that it is to this prospective hypothetical value that consideration has always been given. How the difficulty arises.

In any case, the editors, while appreciating the difficulties of Farnworth *v.* Hyde, cannot agree with the suggestion that the decision is based on any obvious oversight. It is quite clear from the course which the proceedings took in the Exchequer Chamber, that it was by no inadvertence that the Court (*n*) came to the conclusion at which they did in fact arrive. It is also clear that Farnworth *v.* Hyde must be considered as having established the law of the land until, and unless, the House of Lords determines otherwise.

There is now no doubt that, although the whole of the Impracticability of send-

(*m*) 11 C. B. 176.

(*n*) Pollock, C. B., Channell, B., Blackburn and Mellor, JJ., Pigott, B., and Shee, J.

Sect. 1158. ing on the whole.

cargo cannot be sent on (o), this circumstance is not conclusive in determining whether a sale by the master is justifiable, or the loss on goods constructively total (p).

It is equally clear, and is established by the same authorities, that if a sale of the cargo be not otherwise justifiable, it will not be rendered so by being made under the decree of a Vice-Admiralty Court or any analogous Court abroad (q).

Sale of partially damaged perishable cargo, which might have been forwarded.

1159. It remains to consider two authorities which seem hardly consistent with the current of later decisions, and would probably not now be supported to their full extent. It may be observed that in neither case was there a warranty to be free of average.

Gernon v. Royal Exch. Ass. Co.

A cargo of sugars was insured from Liverpool to Calais: the ship was forced to put back to Liverpool in a totally disabled state, and the sugars, having been necessarily unloaded,

Cargo unmerchantable.

were found, on survey, to be so sea-damaged that no part of them was in a merchantable state, and that they could not have been sent on except as damaged goods, though ships might easily have been procured to forward them in that state. Under these circumstances the sugars were sold at Liverpool for about two-thirds of their sound value, and the assured, who had given due notice of abandonment, claimed to recover as for a total loss. Gibbs, C. J., told the jury at the trial that the assured would not be justified in abandoning, unless the property was reduced to such a state that it could not be applied to the original purpose of the voyage; but that they would be entitled to do so "if it was not in a proper condition for the market": the jury thought the sugars were not

(o) This was one of the grounds of Lord Mansfield's decision in Manning v. Newnham (1782), 3 Dougl. 130, and arose again in Anderson v. Royal Exch. Ass. Co. (1805), 7 East, 44.

(p) Freeman v. East India Co. (1822), 5 B. & Ald. 617; Morris v. Robinson (1824), 3 B. & Cr. 196; 5 Dowl. & Ryl. 35; Cannan v. Meaburn (1823), 1 Bing. 243; Moss v. Smith (1850), 9 C. B. 94; Rosetto v. Gurney (1851), 11 C. B. 176; Meyer v. Ralli (1876), 1 C. P. D. 358.

(q) See also Reid v. Darby (1808), 10 East, 143; per Dr. Lushington, The Eliza Cornish (1853), 1 Spinks, 36.

in a fit state to be forwarded, and found for a total loss: which verdict the Court refused to disturb (*r*). Sect. 1159.

1160. The following case, if, indeed, it ought not to be put wholly on the ground of an acceptance of the abandonment by the underwriters, which was mainly relied on by the majority of the Court, goes further than any other authority in English law, and seems to show that, although ample opportunities of transhipment exist, and part of the goods are still in a merchantable condition, yet they may be sold and abandoned if, upon the whole, it was better for the interests of all concerned not to forward them. A cargo of Cape wines, consisting of 241 pipes and 71 hogsheads (of the invoice value of nearly 8,000*l.*), was insured (but without any warranty to be free of average) from the Cape to Bristol, Liverpool or Dublin. Had the ship arrived safely, the assured intended to land 100 pipes at Bristol, and to send on the remainder to Dublin, which was therefore the ultimate port of destination. The ship, however, just before reaching Bristol was driven by a gale on the rocks at Portishead, where she bulged, heaved over, and finally lay in such a position that the whole of her cargo was under water at high tide. The assured, immediately on hearing of the casualty, gave notice of abandonment, and measures were then taken, with the express sanction of the underwriters, to rescue the cargo: the result was that 229 pipes and 67 hogsheads were got out, of which 71 pipes and 43 hogsheads were sound and full, and 17 pipes and 4 hogsheads were quite empty; the residue had either partially leaked, or were more or less damaged by sea water, but were not in an unmerchantable

Hudson *v.* Harrison. Cargo not unmerchantable.

(*r*) Gernon *v.* Royal Exch. Ass. Co. (1815), at N. P. Holt, 52, in Banc. 6 Taunt. 387; 2 Marsh. R. 92. On this case being cited in Navone *v.* Haddon (1850), Maule, J., remarked, "That was not the case of an insurance free from average": 9 C B. 38. This is undoubtedly so. It appears from the report in Holt, that the ship had stranded before putting back to Liverpool; the case, therefore, was treated as though no warranty had existed, though the policy, as in the similar case of Rosetto *v.* Gurney, had no doubt been framed with the usual average clause.

Sect. 1160. state, and ships might easily have been procured to take them on to Dublin. The wines were finally sold for the gross sum of 4,044*l.* 2*s.* 6*d.* (rather more than half the invoice price), and for the net sum, after deducting salvage and all expenses, of 2,570*l.* 16*s.* 3*d.* The Court of Common Pleas held that the plaintiff was entitled to a verdict for a total loss (*s*); the majority of the Court laid principal stress on the fact that the conduct of the underwriters amounted to an acceptance of the notice to abandon, and therefore fixed the rights of the parties from that time. Richardson, J., however, put his judgment on the ground that in this case there was such a loss as to give the assured a right of abandonment at the time, and that such right had not been divested by subsequent circumstances. "When notice of abandonment was given, the ship was on the shore on her side, exposed to the operation of the wind and tide, and at high water the whole of the cargo was immersed in the sea; and it was uncertain whether she might not perish with the rise of every tide"; and, after remarking generally on the state of the cargo, and the opinion of all the witnesses that a sale was the best measure for all concerned, he added: "It is material to observe, that such part of the wines as were damaged by the salt water must have become in a more deteriorated state by delay, or by sending them on to Dublin, their final port of destination." Undoubtedly this last consideration is material, and may perhaps be deemed sufficiently so to reconcile this case on its facts with the other authorities, even without putting it exclusively on the ground of an acceptance of an abandonment by the underwriter.

Constructive total loss of freight. Its peculiar nature.

1161. The consideration of the subject of total loss, and especially of constructive total loss, of freight, is rendered difficult by the peculiar nature of freight, regarded as a subject of insurance. To use the words of Cleasby, B. (*t*): "It is not, as is usually the case, an interest in anything which exists, and of which possession can be had, as, for

(*s*) Hudson *v.* Harrison (1821), 3 Brod. & B. 97; 6 Moore, 288.

(*t*) In Potter *v.* Rankin (1870), L. R. 5 C. P. at p. 354.

instance, a ship or cargo, or even" (in the case then before the Court) "freight of cargo on board, of which the lien on the cargo gives a qualified possession; but in such a case of chartered freight as the present the interest is only a right to have cargo provided; it can only be enforced by action, and is in the nature of a chose in action." Sect. 1161.

It is, for example, easy to understand what is meant by an abandonment, or a notice of abandonment, of ship or cargo to underwriters, and it is comparatively easy to appreciate, and to apply, principles of law when we are dealing with tangible objects of this nature. With respect to freight, however, though the principles are the same, their application is more difficult. A notice of abandonment of freight can mean little more than a notice to underwriters that they may, if they please, avail themselves of such chance as there may be of earning the freight, which is in danger of being lost. Great difficulty has been felt as to when such notice must be given, and when it may be dispensed with. This may perhaps be tantamount to saying that there is often great difficulty in distinguishing between an actual and a constructive total loss of freight. It has even been suggested that notice of abandonment is never necessary in order to claim a loss upon an insurance of freight (*u*), which is likewise probably tantamount to saying that there is no such thing as a constructive as distinguished from an actual total loss of this interest. Such a statement is indeed probably too broad, especially in view of the opinion of Brett, J., in Potter *v.* Rankin (*x*), but the mere fact that such a suggestion should have been made illustrates the complexity of the subject. At any rate, there appears to be no reported case where an action for a total loss of freight has ever been defeated for want of a notice of abandonment. Meaning of notice of abandonment of freight.

1162. The leading case on the subject of total loss (actual or constructive) of freight, and the necessity of giving notice Facts of Potter *v.* Rankin.

(*u*) Mount *v.* Harrison (1827), 4 Bing. 388; Idle *v.* Royal Exch. Ins. Co. (1819), 8 Taunt. 755.

(*x*) L. R. 6 H. L. at p. 102.

Sect. 1162. of abandonment, is now Rankin *v.* Potter (*y*), containing not merely a decision of the House of Lords but also the opinions of the various judges who were called in to advise their lordships. The facts of the case were as follows:—The "Sir William Eyre" sailed in December, 1862, from Greenock to New Zealand. More than a month afterwards she was chartered by her owners to proceed, after discharging at New Zealand, to Calcutta and load a cargo for England at a specified rate which the charterer bound himself to pay. The owners then effected the policy in question, against perils of the sea, &c., upon the freight to be earned on this homeward voyage. The vessel eventually arrived at Calcutta so badly damaged by perils of the sea as to make it impossible to perform the voyage thence back to England, and her owners abandoned her to the underwriters on ship. The owners under these circumstances brought an action as for a total loss of the chartered homeward freight, having meanwhile given a notice of abandonment of freight, which notice, however, it was contended by the underwriters was given too late. The House of Lords, in accordance with the opinion of the majority of the judges, held that no notice of abandonment to underwriters on freight was necessary. It is not quite clear, and perhaps it is not very important to consider, whether the prevalent view was that the case was one of actual and not of constructive total loss, in which case notice of abandonment would naturally be unnecessary, or that though a case of constructive total loss, notice of abandonment was excused because there was in reality nothing to abandon (*z*). Some of the judges prefer to shape their reasons from the one point of view and some from the other.

(*y*) Potter *v.* Rankin (1868), L. R. 3 C. P. 562; (1870), L. R. 5 C. P. 341; (1872), L. R. 6 H. L. 83 (Rankin *v.* Potter).

(*z*) Sects. 61—63 of the Marine Insurance Bill, 1899, appear to imply that it is not necessary that there should be a notice of abandonment in order to constitute a constructive loss. But failure to give notice, unless excused, will prevent the assured from recovering, except for a partial loss.

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1163. Perhaps the most lucid general exposition of the law applicable to the subject is to be found in the opinion delivered by Brett, J. (*a*): "There may be an actual total loss of freight if there be an actual total loss of ship, or an actual total loss of the whole cargo. An actual total loss of ship will occasion an actual total loss of freight, unless, when the ship is lost, cargo is on board, and the whole or a part of such cargo is saved, and might be sent on in a substituted ship so as to earn freight (*b*). An actual total loss of the whole cargo will occasion an actual total loss of freight, unless such loss should so happen as to leave the ship capable, as to time, place, and condition, of earning an equal or some freight by carrying other cargo on the voyage insured." And later (*c*): "It is a correct proposition of insurance law to say that no abandonment is necessary, and no notice of abandonment is required, where there is nothing to abandon which can pass to or be of value to the underwriters. It follows that on a policy on freight in general terms there need be no abandonment of freight, and no notice of abandonment is required, where the ship is damaged to such an extent or under such circumstances as would authorize an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or, if on board, where none is saved with the chance of an opportunity of its being forwarded in a substituted ship. In the several states of circumstances above set forth, the loss of freight on the policy on freight would be an actual total loss. This conclusion does not go the length of determining that there never can be a constructive total loss of freight. If, for instance, the ship should be damaged as described, but cargo which was on board has been saved under circumstances which leave it doubtful whether such

Actual total loss of freight.

No notice of abandonment necessary where nothing can pass to underwriters.

When may there be a constructive total loss of freight?

(*a*) L. R. 6 H. L. at p. 99.

(*b*) These observations would not apply to a case where not only the ship, but also the cargo, is a constructive total loss, and any freight which might possibly be earned by forwarding the cargo would be earned by salvors, independently of the original contract of affreightment. See Guthrie *v.* North China Ins. Co. (1900), 6 Com. Cas. 25, Mathew, J.

(*c*) Page 102.

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cargo might or might not be forwarded in a substituted ship, or if the original cargo should be lost and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight."

Effect of loss of ship or cargo on an insurance on freight.

1164. It appears, therefore, that an absolute total loss of ship and cargo necessarily must, but that a total loss, whether absolute or constructive, of either only, may or may not, involve an absolute total loss on freight. In other words, where the circumstances of the case are such as to make the ultimate earning of freight wholly impossible, no notice of abandonment is requisite in order to enable the assured on freight to recover the whole sum he has insured on that interest (*d*). On the other hand, where the circumstances are such as to make the ultimate earning of freight highly doubtful, without, however, destroying all hope of eventually earning it, then notice of abandonment may be necessary to entitle the assured on freight to recover as for a total loss on that interest.

"There seems little doubt," says Tindal, C. J., "that the assured has the right of abandoning the freight where there has been a constructive total loss of the ship" (*e*); but, as in the case of ship and goods, this right is *primâ facie* merely, and

(*d*) Rankin *v.* Potter (1873), L. R. 6 H. L. (E. & I.) 83; Green *v.* Royal Exch. Ass. Co. (1815), 6 Taunt. 68; Idle *v.* Royal Exch. Ass. Co. (1819), 8 Taunt. 755; 3 Moore, 115; Wilson *v.* Forster (1815), 6 Taunt. 25; 1 Marsh. R. 425; Robertson *v.* Marjoribanks (1819), 2 Stark. 573; Mount *v.* Harrison (1827), 4 Bing. 388; Trinder, Anderson & Co. *v.* Thames, &c. Mar. Ins. Co., [1898] 2 Q. B. 114, where it is pointed out that the observations of Brett, L. J., in Kaltenbach *v.* Mackenzie ((1878), 3 C. P. D. at p. 475) cannot be taken to apply to an insurance on freight: per A. L. Smith, L. J., at p. 122.

(*e*) Per Tindal, C. J., in Benson *v.* Chapman (1849), 6 M. & Gr. 810; not affected as to this point by the judgment of the Court of Error or the House of Lords. See this acknowledged by Lord Truro in Scottish Marine Ins. Co. *v.* Turner (1853), 1 Macq. H. L. Cas. 334.

the claim of the assured on freight to recover as for a total loss depends solely on the question whether, in point of fact, freight has or has not been earned at the time of action brought. Sect. 1164.

Thus, there can be no doubt that capture, arrest, embargo, or any other peril insured against, the effect of which either is to break up the voyage altogether or to prevent, or for a very long period suspend, the earning of freight, gives the assured on freight an immediate right to give notice of abandonment to the underwriters on that interest; and, after giving such notice, he may recover against the underwriters as for a total loss, provided no freight is earned before the commencement of the action (*f*).

Where freight has been actually earned, the underwriters on freight are not liable, though it may not have been earned by the assured. M'Carthy *v.* Abel.

1165. Where, however, freight is eventually earned before the action is commenced, the right of the assured on freight to recover as for a constructive total loss is divested, although it may not have been earned by him, and may be, as far as he is concerned, an actual total loss. Thus, an insurance was effected on the homeward freight of a ship, which had sailed out in ballast to Riga, under a charter-party: after the greater part of the cargo had been loaded on board at Riga, the ship was seized under the Russian embargo of the 7th November, 1800; the master and crew were taken out and the cargo relanded: on receiving intelligence of this casualty, the assured gave immediate notice of abandonment, both to the underwriters on freight, and also, on the same day, to the underwriters on ship, with whom he had effected a separate insurance: in May, 1801, the embargo was taken off, the master and crew were released, the original cargo was again put on board, and the ship arrived with it in this country before action brought, earning full freight. Under these circumstances Lord Ellenborough held, that the plaintiff could not recover a total loss against the underwriters on freight: 1. Because freight had in the event been fully

(*f*) See Thompson *v.* Rowcroft (1803), 4 East, 34, and the other cases on the Russian embargo.

Sect. 1165. earned, and therefore no loss could be properly demandable from the underwriters on freight, "who merely insure against the loss of that particular subject;" 2. If freight could be considered as in any other sense lost to the assured, it had become so by their own act in abandoning the ship to the underwriters thereon, with which act, and its consequences, the underwriters on freight had nothing to do (*g*).

Scottish Mar. Ins. Co. *v.* Turner.

The same view was taken by the House of Lords in the case of the Scottish Marine Insurance Co. *v.* Turner (*h*). In that case the "Laurel," during a voyage from Quebec to Liverpool, was seriously damaged by an iceberg. She succeeded, however, eventually in completing her journey and earned her freight, which was received by her owners. A survey of the ship, which was subsequently held, showed that she was not worth repairing, and notice of abandonment was given to her underwriters. It was decided in an action against the latter, that they were liable for a constructive total loss, but were entitled to be credited with the freight received (*i*). The owners, then, being compelled to account to the underwriters on ship for this freight, brought an action on the policy for freight. It was held, however, that inasmuch as freight had been actually earned, it was impossible to support an action for its loss.

A mere retardation of the voyage gives no right to the assured on freight to recover, if it be ultimately earned.

1166. Similarly, a mere retardation of the adventure, by a loss of the voyage for a season, gives no right to the assured on freight to recover as for a total loss, even after notice of abandonment, if it does not prevent the freight from being ultimately earned before action brought.

(*g*) M'Carthy *v.* Abel (1804), 5 East, 388. The head-note to this case is wrong in stating that abandonment of freight was accepted by the underwriters. Had it been so, the latter could have had no defence to the claim for a total loss.

(*h*) (1853), 1 Macq. H. L. Cas. 334. Cf. Benson *v.* Chapman (1849), 2 H. L. Cas. 696.

(*i*) Stewart *v.* Greenock Mar. Ins. Co. (1847), 1 Macq. H. L. Cas. 328. The mere fact, however, that salvors succeed in bringing part of an abandoned cargo to its port of destination will not prevent there being a total loss of freight. See Guthrie *v.* North China Ins. Co. (1900), 6 Com. Cas. 25.

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Everth *v.* Smith.

A British ship was chartered to proceed to a port in the Baltic with her outward cargo, there to unload, and then sail, in ballast, to Riga, where she was to load a homeward cargo from the charterer's agents. An insurance was effected generally on freight for the homeward voyage. The ship, having performed the first part of her voyage according to the charter-party, sailed to Riga in ballast, where she arrived in September, and was immediately seized and detained by order of government, without being suffered to load a cargo. This detention continued till the frost set in, in consequence of which the ship was kept at Riga all the winter, and never got a loading from the charterer's agents at all: next spring, however, the master procured a loading from other persons, with which, before action brought, he returned to England, and earned full freight. The assured claimed a total loss, but the Court held he could not recover.

And, in order to satisfy the policy on freight, the freight earned need not be the particular freight contracted for.

The insurance being on freight generally, "the underwriter," said Lord Ellenborough, "did not insure that any particular freight should be brought home, but if any freight is brought home, a loss has not happened for which he undertook to indemnify the assured. In this case," continued his Lordship, "the only inconvenience that has arisen is to be attributed to the protraction of the adventure; but that was decided, in Anderson *v.* Wallis and M'Carthy *v.* Abel, not to constitute a loss. It is certainly a loss of the particular trade which the assured had personally in contemplation, but it is not within the intention of the policy. The mere retardation of the adventure, and the consequent inconvenience and expense arising from it, are not a substantive cause of loss where the particular thing insured has not received damage; and whether the freight earned be the particular freight contracted for by the assured, or a posterior freight, makes no difference: if freight has been fully earned there can be no loss properly demandable of the underwriters" (*k*).

(*k*) Everth *v.* Smith (1814), 2 M. & S. 278. See *S. P.* in Barclay *v.* Stirling (1816), 5 M. & S. 6. As to the effect of a receipt of pro ratâ freight upon the right of an assured to recover for a total loss of freight insured, see Price *v.* Maritime Ins. Co. Ld. (1900), 5 Com. Cas. 332; affirmed by C. A. on 7th June, 1901.

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1167. In a case, indeed, that came before Sir Vicary Gibbs, the year after this decision, that learned person intimated, in the course of the argument, that, when the freight of a ship is insured, as soon as the cargo is put on board it becomes an insurance on the freight of that cargo (*l*): but the year following, Lord Ellenborough decided the case of Barclay *v.* Stirling on the same principle as that laid down in Everth *v.* Smith (*m*): and it was subsequently acted upon by Lord Tenterden (*n*), and may therefore be considered to be as firmly upheld by authority, as it is reasonable on principle.

If freight is in the event actually and fully earned, the mere fact that it is swallowed up at the port of destination by the charges of a bottomry loan, raised by the master abroad, as agent of the owners, for the repair of his ship, does not constitute a constructive total loss as against the underwriters on freight (*o*).

Constructive total loss on freight, where ship or goods are lost. Effect of transhipment.

1168. If, in the course of the voyage, the original ship be disabled or lost, so that the master has no power of repairing her, he has the right to send on the goods by another ship, if such can be procured (*p*). If he do so send them on in performance of his contract to carry, he thereby earns the original freight, and is entitled to charge the insurers with the expense of it (*q*). In respect of the shipper, it is doubtful whether the shipowner's performance of that contract, after his ship is finally disabled, is anything more than an option as distinct from a legal obligation (*r*); but in respect of the insurer on freight, it seems the shipowner is in these circum-

(*l*) In Green *v.* Royal Exch. Ass. Co. (1814), 1 Marsh. R. 447; 6 Taunt. 68.

(*m*) Barclay *v.* Stirling (1816), 5 M. & S. 6.

(*n*) Brockelbank *v.* Sugrue (1831), 1 Mood. & Rob. 102.

(*o*) Benson *v.* Chapman (1849), 6 Man. & Gr. 792; 5 C. B. 330; 2 H. L. Cas. 696, *post*, s. 1174.

(*p*) Shipton *v.* Thornton (1838), 9 A. & E. 314.

(*q*) Kidston *v.* Empire Ins. Co. (1867), L. R. 1 C. P. 535; in error, 2 C. P. 357.

(*r*) See Shipton *v.* Thornton (1838), 9 A. & E. 314; Carver on Carriage, s. 305; 2 Phillips, Ins. ss. 1625, 1632; and Kidston *v.* Empire Ins. Co. (1867), L. R. 2 C. P. 364. The American law possibly differs herein from that of this country.

stances under an obligation either himself to perform the contract (*s*), or by timely abandonment to enable the insurer, if he choose, to perform it for his own benefit (*t*). This is a right on the part of the insurer, with a corresponding duty on the part of the shipowner. The mere loss or disability of the original ship, if the goods may be sent on in another, although it may give the assured a *primâ facie* right of abandonment, does not necessarily involve a constructive total loss of freight. Similarly, the mere loss of cargo does not necessarily involve a total loss of freight, if the ship can obtain another cargo for the same voyage. Sect. 1168. Substituted cargo.

1169. If both ship and cargo have been sold abroad, under such circumstances of urgent necessity as to justify their sale, the assured may, as we have seen, without any notice of abandonment, recover as for a total loss on the freight (*u*). Where, however, the sale is not thus justified by necessity, but the ship might have been repaired, or the cargo sent on so as to earn freight, the shipowner ought not to be allowed to throw on the underwriter on freight a total loss caused, not by the perils insured against, but by the unauthorized act either of himself, or of the master as his agent; and in such a case mere notice of abandonment, unaccepted, cannot alter the rights of the parties (*x*). Where both ship and cargo are sold abroad. If sale unjustifiable, no total loss of freight, either actual or constructive.

The principle, in short, seems to be this: where the sale of ship and cargo is justified, notice of abandonment to the underwriter on freight is unnecessary; where such sale is not justifiable, it is inoperative unless accepted or acted upon.

1170. The case generally cited as showing notice of abandonment to be necessary, in order to recover for a total loss on freight, where ship and cargo had been sold abroad, is that of Parmeter *v.* Todhunter, which was a policy of insur- Parmeter *v.* Todhunter.

(*s*) Benson *v.* Chapman (1849), 5 C. B. 330, 363; 2 H. L. 696.

(*t*) See Potter *v.* Rankin (1873), L. R. 5 C. P. 341; L. R. 6 H. L. 102.

(*u*) Idle *v.* Royal Exch. Ass. Co. (1819), 3 Moore, 145; 8 Taunt. 755.

(*x*) Chapman *v.* Benson (1849) (in error), 5 C. B. 363.

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ance "on the freight of the ship 'Portsea,'" insured from Berbice to London. The ship, in the course of her voyage, was captured, recaptured, and carried into Grenada, where she was sold with the whole of her cargo. The plaintiff, who had given no valid notice of abandonment, claimed a total loss. It was contended that no notice was necessary, *sed non allocatur*, for the goods might have been brought home in another ship, and so freight have been earned (*y*). It is clear, by what fell from Lord Ellenborough, that the circumstances of this case were not such as to make the sale of the whole ship and cargo justifiable. The case, therefore, is rather an authority for the position that there is no total loss on freight by an unjustifiable sale of ship and cargo, than for the position that notice of abandonment is requisite where ship and cargo have been justifiably sold.

Green *v.* Royal Exch. Ass. Co.

The next case in which the point arose—Green *v.* The Royal Exchange Assurance Company—is quite consistent, when its facts are considered, with that last cited. In this case the insurance was on freight by the ship "Defiance" at and from the Canary Islands to London. The ship, having sailed on her voyage with a full cargo on board, was, in consequence of sea-damage, obliged to put back and to unship her cargo; and, the ship being found so disabled that it would be impossible to bring her home without repairs, which could not be procured where she was, both ship and cargo were sold. The purchaser of the ship, having repaired her, brought her home with half a cargo; her captain (who was also owner and plaintiff in the action) bought another ship of small burden, in which he also brought goods to London, but none of the original cargo. Having brought his action against the underwriters on freight for a total loss, two objections were made to his right of recovery: 1. That he had given no notice of abandonment; 2. that the sale was not justified by necessity. The Court, as to the first objection, which was supported on the authority of Parmeter

(*y*) Parmeter *v.* Todhunter (1808), 1 Camp. 541.

v. Todhunter, held that there was nothing in it; but, as to the second, a new trial was granted, in order that the jury might consider whether the sale of the ship, under the circumstances, was such a measure as a prudent owner, if uninsured, would have resorted to; or whether he would not have repaired and sent her on, so as to earn freight (*z*). "I think," said Gibbs, C. J., "the assured ought to have acted as if the adventure had not been insured; and, if a man of common prudence would have repaired her for his own advantage, not being insured, he should have done so on account of the underwriters; otherwise he would have been selling the ship for the purpose of throwing the loss" (of freight) "on the underwriters" (*a*). Sect. 1170.

1171. In Idle *v.* Royal Exchange Assurance Company, the insurance was on the freight of the ship "Ajax," for a voyage from Quebec to her port of discharge in the United Kingdom. The ship and cargo having been sold abroad by the master and one of the part owners under circumstances which, in the opinion of the Court of Common Pleas, justified the sale on the ground of urgent necessity, that Court held that no notice of abandonment was necessary to entitle the assured on freight to recover a total loss (*b*). When, however, the same case came before the Court of King's Bench on a special verdict, that Court directed a *venire de novo*, on the ground that the necessity of the sale was not distinctly found in the special verdict, and could not be inferred from the facts stated; and Bayley, J., added, on the same occasion, "That the question, whether the circumstances amounted to an abandonment, might also be left open" (*c*); *i.e.*, whether, even with notice of abandonment, the assured would have had a right to recover as for a total loss on freight. Idle *v.* Royal Exch. Ass. Co.

These cases seem to be, in fact, mere illustrations of the Mount *v.* Harrison.

(*z*) Green *v.* Royal Exch. Ass. Co. (1815), 6 Taunt. 68; 1 Marshall, R. 447.

(*a*) 1 Marshall, R. 452.

(*b*) Idle *v.* Royal Exch. Ass. Co. (1819), 3 Moore, 115; 8 Taunt. 755.

(*c*) 3 Brod. & Bing. 151, n. (*d*).

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principle, afterwards finally established in Rankin *v.* Potter, that notice of abandonment of freight is unnecessary in cases where the underwriters could not possibly derive any advantage by receiving such notice. Such, too, appears to have been the *ratio decidendi* in the case of The Olive Branch, where freight was insured from the Cape of Good Hope to London. The ship, while loading in Table Bay, was driven ashore, and sold under circumstances of such urgent necessity as, in the opinion of the Court, fully to justify the sale; the cargo, one-third of which was loaded on board at the time of loss, and the rest engaged, was immediately sent on to England in another vessel. The plaintiff claimed a total loss on freight: it was objected that he should have given notice of abandonment; but the Court, under the circumstances of the case, thought it unnecessary, and the plaintiff recovered the whole amount of his insurance (*d*).

Notice of abandonment unnecessary where ship properly sold and freight cannot possibly be earned.

It must be assumed in this case that the event upon which the earning of the freight insured was made to depend, was the arrival of the ship under the charter-party: if the freight insured had been made payable on the delivery of the goods, in terms of the bill of lading, it should seem that, as the goods were actually sent on, and arrived so as to earn freight, by another ship, that this was precisely the case contemplated by Lord Ellenborough in Parmeter *v.* Todhunter, and that, as the loss on freight became, in the event, less than total, the assured would not have been entitled to claim as for a total loss (at all events, without notice of abandonment); that which he should have abandoned being the chance of the cargo arriving, so as to earn higher freight than that which the shipowner would have to pay for the hire of the ship in which it was sent on. Where, under similar circumstances, the master sold, not only the ship, but also the cargo, from the impossibility of sending it on, except at an exorbitant rate of freight, this was held in the United States, and as it seems justly, an absolute total loss of freight.

(*d*) Mount *v.* Harrison (1827), 4 Bing. 388; 1 Moore & P. 14.

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1172. Where the original ship can be repaired in a reasonable time, or the cargo may be sent on in a substituted ship, at a reasonable amount of cost and trouble, and with a fair hope of its ultimately arriving in specie, or in a merchantable state, at its port of destination, the master ought to send it on and is not justified in selling; and the shipowner will not be entitled on the ground of the master's negligence or improper conduct, in selling the goods instead of forwarding them, to give notice of abandonment and recover as for a total loss on freight (*e*).

If master sells the goods, when he ought to forward them, the loss on freight thereby caused cannot be thrown on the underwriter.

So, in the case of Mordy *v.* Jones, where the original ship, after putting back to refit, had been repaired so as to be capable of taking on the goods, and the goods, though sea-damaged, were capable of being forwarded, though not without involving a considerable delay and an expense equal to the freight, it was decided in this country that the master could not, by selling instead of taking them on, entitle the shipowner to throw the loss of their freight on the underwriter (*f*). The expense, though equal to the freight, might yet have been far below the selling value of the goods; that, therefore, was not an expense such as entitled the master to sell them; but he was entitled to carry them on and to earn freight, and if he voluntarily surrendered this advantage, he could not then turn round on the insurers of freight and claim for a loss, since the loss was not the effect of any of the perils insured against (*g*). If, however, such expense were so great as to involve a constructive total loss of the goods, he could recover as for a total loss of freight, at any rate by giving notice of abandonment (*h*).

Constructive total loss of goods may justify abandonment of freight.

(*e*) See the United States decisions, Saltus *v.* Ocean Ins. Co. (1815), 12 Johnson, R. 107; Bradhurst *v.* Columbian Ins. Co. (1812), 9 Johnson, R. 17; Griswold *v.* New York Ins. Co. (1806), 1 Johnson, R. 205; 2 Phillips, ss. 1639, 1640.

(*f*) Mordy *v.* Jones (1825), 4 B. & Cr. 394; Brockelbank *v.* Sugrue (1831), 1 Mood. & Rob. 102. In the case of Mordy *v.* Jones, the merchant had himself consented to the goods being left behind and sold, as the best step under the circumstances.

(*g*) Mordy *v.* Jones, *supra*; Philpott *v.* Swann (1861), 30 L. J. C. P. 358; 11 C. B. N. S. 270.

(*h*) Michael *v.* Gillespy (1857), 26 L. J. C. P. 306.

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Mere inability to send on the entire cargo is not a case of constructive total loss on freight. Moss v. Smith.

1173. Mere inability to send on the entire cargo is no case of constructive total loss on freight. A ship valued at 12,000*l.* was insured from Valparaiso to England: freight valued at 4,000*l.* was insured on the same voyage by a separate policy. The ship having sailed with a full cargo, was compelled by stress of weather to put back to Valparaiso, where the master—finding on survey that to repair her so as to bring home the entire cargo would cost more than the value of the freight, though less than the value of the ship when repaired—sold the ship: the cargo, 900 tons, was sent on in other ships and ultimately arrived at Liverpool, earning freight to the amount of about 3,600*l.* This was held not to be a total loss, either of ship or freight (*i*).

Where freight is earned, but received by bottomry bondholder instead of by assured, the latter cannot recover. Benson v. Chapman.

1174. If the master, instead of sending on the cargo in another vessel or selling it where it lies, repairs the original ship on bottomry, and the repaired ship subsequently arrives before action brought, earning full freight, but subject to a lien under the bottomry bond to an amount greater than the joint value of the ship as repaired and the freight as earned, this is not a constructive total loss on freight, so as to entitle the assured, who has given timely notice of abandonment, to recover the whole amount of the insurance. The point arose upon the following facts: The freight of a general ship was insured for a homeward voyage from Pernambuco to Liverpool; the ship received such damage in coming out of Pernambuco Harbour as to be totally disabled for the voyage without repairs; the master, instead of selling, repaired the ship on bottomry and afterwards brought her on to Liverpool, where she arrived before the commencement of the action, earning full freight, but burdened with a charge on the bottomry bond which exceeded the joint amount of the ship's value as repaired and of the freight earned. The plaintiff, who had given due notice of abandonment on first hearing of the probable expense of repairs, allowed the ship

(*i*) Moss *v.* Smith (1850), 9 C. B. 94.

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to be sold and the freight paid over on behalf of the obligees on the bottomry bond, and then sued the underwriters on freight as for a total loss. When the case first came before the Court of Common Pleas, that Court held (on the authority principally of Holdsworth *v.* Wise) that this was a constructive total loss on freight (*k*); the Court of Exchequer Chamber, however, reversed the judgment (*l*), and the reversal was sustained by the House of Lords (*m*). The receipt of the freight by the holder of the bottomry bond was treated as a receipt of freight by the plaintiff, and the case was put upon the point that the freight was not actually lost by the perils insured against, for it was in point of fact actually earned; if lost to the plaintiff at all, it was by his own acts and omissions. "The underwriters on this policy," it was said, "engage only that freight shall be earned, and it has been earned" (*n*).

Effect of abandonment of ship on the freight underwriters.

1175. The effect of an abandonment to the underwriters on freight, when there is a separate insurance and a separate abandonment on the ship, was long a subject of vexed discussion in this country, but has now been finally set at rest. The case supposed is, that the ship is insured with one set of underwriters, and the freight with another; a constructive total loss of ship takes place, the assured abandons the ship to the underwriters on ship, and the freight to the underwriters on freight; the ship, after the abandonment has been made and accepted by both sets of underwriters, arrives earning freight: the question is, which set of underwriters shall take the benefit of the freight so earned? The question was a good deal litigated in several cases (*o*) which arose out

(*k*) Benson *v.* Chapman (1843), 6 M. & Gr. 792.

(*l*) Chapman *v.* Benson (1847), 5 C. B. 330.

(*m*) Benson *v.* Chapman (1849), 2 H. L. Cas. 696.

(*n*) Opinion of the Judges in Benson *v.* Chapman (1849), 2 H. L. Cas. 722—724. The principle here decided seems identical with that of Scottish Mar. Ins. Co. *v.* Turner and similar cases, which will be found considered in the next following pages.

(*o*) Thompson *v.* Rowcroft (1803), 4 East, 34; Leatham *v.* Terry (1803), 3 B. & P. 479; M'Carthy *v.* Abel

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of the Russian embargo of 1800, and was at last determined in Case *v.* Davidson, the facts of which were as follows:—

Case *v.* Davidson.

The defendant (shipowner) had insured a general seeking ship with one set of underwriters, and afterwards her freight with another set of underwriters, by two separate policies. The ship having been captured, the defendant gave immediate notice of abandonment to both sets of underwriters on the same day, which notice they respectively accepted. Afterwards, the ship having been recaptured, arrived earning freight; and the two sets of underwriters settled with the defendant as for a total loss, under an agreement that the ship should be sold, and the defendant hold the proceeds of her sale, and also the freight actually earned, for the use and benefit of the parties legally entitled thereto. The money realized by the sale having been paid over to the underwriters on ship, they now further claimed to recover from the defendant the amount of the freight held by him, under the agreement already mentioned. A majority of the Court of King's Bench held that they were entitled to recover (*p*); and this judgment was confirmed by the Court of Exchequer Chamber (*q*).

Abandonees of ship take all pending freight ultimately earned.

In the Court below, the grounds on which Lord Ellenborough, Abbott, J. (afterwards Lord Tenterden), and Holroyd, J., rested their judgment were mainly these: That an abandonment to the underwriter on ship transfers to him not merely the hull, but the use of the ship, and the advantages resulting from the completion of the voyage; that, as abandonee of ship, "he has all the rights of the shipowner cast upon him by operation of that emphatic word in the law merchant, 'abandonment;' and, being so entitled, has a right, if he uses the ship for completing the voyage, to her earnings, as against all the world;" that it is a principle clearly established, that if the ship be sold the vendee is

(1804), 5 East, 388; Sharpe *v.* Gladstone (1805), 7 East, 24; Ker *v.* Osborne, (1808), 9 East, 378.

(*p*) Case *v.* Davidson (1816), 5 M. & S. 79.

(*q*) Davidson *v.* Case (1820), 2 Brod. & Bing. 379; 3 Moore, 116; 8 Price, 542.

entitled to freight as an incident to the ship; that abandonment is equivalent to a sale of the ship, and therefore operates a complete transfer of all rights consequent upon a sale, including freight. Upon these grounds, they held that the plaintiff, as abandonee of ship, became entitled immediately to all the freight ultimately earned, as a necessary consequence of the abandonment, and was therefore entitled to recover the amount he claimed (*r*). Sect. 1175.

1176. This decision of the Exchequer Chamber was fully supported by the House of Lords in the case of the ship "Laurel," in which the principle was affirmed that "Freight, while the ship is in a course of earning it, is a benefit or advantage incident to the ship, and therefore becomes the property of the underwriters on ship, paying for a total loss." The short facts of the case were these:—The "Laurel," in the course of a voyage from Quebec to Liverpool, struck upon an iceberg in the Atlantic on the 27th July, and was very considerably injured. She reached Liverpool, however, and while in the river there grounded outside the dock gates on the 11th of August, and was afterwards taken into dock, and, on the cargo having been discharged, was surveyed. After the survey the owners abandoned to the underwriters on ship, and claimed as for a total loss. The jurors found as a fact in the case that there was, under the circumstances, a total loss of the "Laurel," which, as she lay in dock, was properly abandoned and not worth repairing. It was held by the House of Lords that the underwriter on the ship was entitled, Stewart *v.* Greenock Mar. Ins. Co.

(*r*) See 5 M. & S. 82—84, 86—90. Bayley, J., dissented from the rest of the Court, principally on the ground that, as the underwriter on ship insures only the body, tackle and apparel of the ship, he has no right, therefore, to expect from an abandonment more than he has insured (see *ibid.* 84—86). The established doctrine is also commented upon and explained by Brett, M. R., in Sea Ins. Co. *v.* Hadden (1884), 13 Q. B. D. at p. 716:—"It does not seem to me that the payment of freight under these circumstances is made under the original contract of affreightment. It is a payment for work and labour done, and the original contract of affreightment, where it exists, is invariably taken by the tribunal which tries the question as the measure of the value of the work and labour done."

Sect. 1176. on settling for a total loss, to have the benefit, in account, of the freight which had been received by the owner on the discharge of the cargo (*s*).

Scottish Mar. Ins. Co. *v.* Turner.

The shipowner, having been thus deprived of his freight by operation of law, brought his action against the underwriter on freight to recover the whole amount insured in the freight policy, as for a total loss on that interest. The Court of Session gave judgment in his favour, but that decision was reversed by the House of Lords, on the short ground that, the condition of the freight policy being simply that freight should be earned, and freight having been actually earned, the condition of the freight policy had been fulfilled, and the fact that the freight had been paid not to the plaintiff (the shipowner) but to the underwriters on ship was held to make no difference (*t*).

Underwriters on freight not liable if freight has been actually earned.

Two meanings of "loss of freight."

"The expression, the 'loss of freight,'" says Lord Truro in delivering his opinion in the House, "has two meanings, and the distinction between them is material:—

"1. Freight may be lost in the sense that, by the perils insured against, the ship has been prevented earning freight.

"2. Freight may be lost in the sense that, after it has been earned, the owner has been deprived of it by some circumstance unconnected with the contract between the assured and the underwriter on freight. For a loss of freight in the first sense the underwriter on freight is responsible; for a loss of freight in the second sense he is not (*u*)."

The freight transferred by

1177. The freight transferred by the abandonment is the

(*s*) Stewart *v.* Greenock Mar. Ins. Co. (1848), 2 H. L. Cas. 159. Lord Cottenham puts this throughout his judgment as a case of actual total loss of ship; and the case, therefore, is an authority for the position that in such case freight, when earned, vests in the underwriter on ship paying for a total loss.

(*t*) Scottish Mar. Ins. Co. *v.* Turner (1853), 4 H. L. Cas. 312; *S. C.*, 1 Macq. H. L. 334; confirming the case of M'Carthy *v.* Abel (1804), 5 East, 388. In order to avoid the effect of this decision, club policies sometimes provide that a total loss of freight is to be paid in the event of the total loss of ship. For an example, see U. K. Mutual Assoc. *v.* Boulton (1898), 3 Com. Cas. 330.

(*u*) Per Lord Truro in Scottish Mar. Ins. Co. *v.* Turner (1853), 1 Macq. H. L. 340.

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the abandonment is the whole freight pending at the time of the casualty, and ultimately earned by the ship.

whole freight pending at the time of the casualty which gave occasion to the abandonment, and ultimately earned by the ship. This follows from the principles—1. That an abandonment, if accepted and effectual, clothes the abandonee with all the rights of ownership from the moment of the loss that gave the right to abandon, and substitutes him from that time in the place of the assured (*x*); 2. That freight earned under an entire contract is never apportionable, except by express stipulation (as where it is agreed that a portion of the freight shall be paid on the ship's arrival at an intermediate port), or by act of the parties (as where the merchant shipper agrees to take his goods at the port of distress, in which latter case freight *pro ratâ* is due).

Abandonment does not transfer freight earned *pro ratâ*, or by delivery of part cargo before the casualty.

If some freight has been actually earned before the casualty took place, by payment of part or delivery of part of the cargo, under the terms of the charter-party, at an antecedent port, or by an agreement between the shipowner and the merchant whereby freight *pro ratâ* has become due on part of the goods, the freight so paid or so apportioned would not vest in the abandonee of the ship (*y*).

Nor damages in respect of loss of freight recovered by shipowner from wrongdoers.

1178. It is also to be noticed that abandonment does not necessarily divest the shipowner of all rights which he may have in connection with the ship abandoned; it is only rights which are strictly incidental to his ownership which are so transferred. For example, the defendants, owners of the "Queen of the East," insured her with the plaintiffs for a voyage for which she was chartered, and also insured with other underwriters the freight expected to be earned. The freight was never earned, owing to the vessel colliding with the "Cassandra" and becoming a constructive total loss. For this collision the "Cassandra" was solely to blame, and

(*x*) 2 Emerigon, c. xvii. s. 6, p. 232, and *ibid.* p. 256, goes further, and says it makes the abandonee owner from the commencement of the risk (*dès le principe*); but this is incorrect according to English law, see Miller *v.* Woodfall, *infra*.

(*y*) The Red Sea, [1896] P. 20. And cf. Luke *v.* Lyde (1759), 2 Burr. 882, and Thompson *v.* Rowcroft (1803), 4 East, 44, per Le Blanc, J.

Sect. 1178. the defendants recovered from the owners of the latter vessel damages for the loss of their ship, and also for the loss of her freight. The plaintiffs, having paid the defendants for a total loss of the "Queen of the East," claimed to be entitled to receive from them the damages recovered from the owners of the "Cassandra" under both heads. It was decided, however, that the expected freight was not an incident of the ownership of the vessel, and that the right thereto and to recover damages for its loss did, therefore, not pass to the plaintiffs, as underwriters on ship, by virtue of the abandonment (*z*).

Rights of abandonees of ship as to freight earned by substituted ship.

It further follows from the principles just stated, that if the pending freight be ultimately earned by a substituted ship, the original vessel being totally disabled, the original owners, as parties to the charter-party, are the persons entitled, and not the abandonees of ship (*a*), unless these latter can show that the master in hiring another ship acted as their agent, a thing not to be presumed. Of course, if there be no pending freight, although there be cargo on board, as where the assured is owner both of ship and cargo, the abandonees of ship recover nothing in the name of freight or for use of the ship, except for so much of the voyage as is accomplished with the cargo on board after the abandonment (*b*). In case the claims of the abandonee of ship be not enforced, the abandonee of freight, who has adjusted a total loss, may claim from the assured, as salvage, any freight ultimately earned less the necessary expenses of earning it (*c*).

Pro ratâ freight in the United States.

1179. Our law, as fixed by the decisions, seems undoubtedly to present the anomaly, "that the assured on freight may, by making a distinct contract with a third party, deprive the underwriter on the freight of the salvage to which he would have been entitled had no such contract been made" (*d*). In

(*z*) Sea Ins. Co. *v.* Hadden, C. A. (1884), 13 Q. B. D. 706; and see *post*, s. 1232.

(*a*) Hickie *v.* Rodocanachi (1859), 28 L. J. Ex. 273; 4 H. & N. 455.

(*b*) Miller *v.* Woodfall (1857), 27 L. J. Q. B. 120; 8 E. & B. 493. See Brown *v.* North (1852), 8 Exch. 1.

(*c*) Barclay *v.* Stirling (1816), 5 M. & S. 6.

(*d*) So Arnould, 2nd ed. p. 1153, citing 2 Phillips, Ins. ss. 1649, 1740; but the effect of the decision in Scottish Mar. Ins. Co. *v.* Turner (*ubi supra*) is to throw the loss not on the underwriter on freight, but on the shipowner.

the United States this inconsistency is sought to be avoided by making an apportionment of the freight earned before and after the event which occasions the abandonment. The rule there has long been understood to be, that, on an accepted abandonment of ship, the freight earned previous to the loss, apportioned *pro ratâ itineris*, is to be retained by the ship-owner, or by his representative, the underwriter on freight, to whom it has been abandoned, and that only the freight earned subsequently to the time of loss vests in the abandonee on ship (*e*). Sect. 1179.

It certainly seems that this rule is more free from objections than our own; nor does there appear to be any great difficulty in its practical application. Thus, in a case where ship and freight had been abandoned to the respective sets of underwriters, on account of the capture of the ship after she had performed eight-ninths of the voyage insured, the Court held that the underwriters on the freight were entitled, in virtue of the abandonment, to all the vessel's earnings previously to the casualty—that is to say, eight-ninths,—and those on the ship to the remaining ninth (*f*). This case is almost identical with that put by Bayley, J., in order to illustrate the unfairness of the English rule, according to which the underwriter on the ship in such case would receive the whole benefit and earnings of the voyage, although he would only be at a few days' expense for provisions, &c. (*g*).

1180. In France, so long as insurances on pending freight (*fret à faire*) were prohibited, the question could not arise as between the two sets of underwriters (*h*); but the general question as to the effect of an abandonment of the ship on pending freight gave rise to a great deal of embarrassed litigation. Law in France.

(*e*) 3 Kent, Com. 332, and see the cases cited by him, of which the principal are: United Ins. Co. *v.* Lenox (1802), 1 Johnson, 377; 2 Johnson, 443; Marine Ins. Co. *v.* United Ins. Co. (1812), 9 Johnson, 186. See also the cases collected and commented on, 2 Phillips, Ins. ss. 1738—1742.

(*f*) Leavenworth *v.* Delafield, 1 Caines, 578, cited 2 Phillips, s. 1741.

(*g*) In 5 M. & S. 86.

(*h*) Since 1885 such insurance is allowed, Code de Com. s. 334.

Sect. 1180. The Ordinance of 1681 had no specific regulation on the point, and the tribunals denied to the underwriter on ship any freight for the goods saved. Valin exposed the error, and maintained that an abandonment of the ship ought to carry with it all the freight pending, and in the course of being earned, at the time of the casualty, whether stipulated to be paid in advance or not; but not freight actually earned—as, for instance, where, the freight of the outward passage having been earned and paid, the ship is lost in her passage home (*i*).

Opinion of Valin;

Of Emerigon. Emerigon examines the question on general principles, and concludes, with regard to freight in the course of being earned at the time of the casualty, that this passes to the abandonee of the ship just as the fruit growing in an orchard passes, on sale, to the vendee of the orchard. With regard to freight actually earned before the casualty, he admits that this seems to stand in the same predicament with fruit gathered before the sale of the orchard, which of course would not pass to the vendee; but, finally, he determines that this freight also goes to the abandonee on ship, on the ground that the effect of an abandonment is entirely to substitute the abandonee in place of the assured from the beginning of the adventure, so as to make him proprietor of the ship and all its earnings from the commencement of the risk and not only from the time of the casualty (*k*). And the law was so settled by the Chamber of Commerce of Marseilles in 1778. The Ordinance, however, of the ensuing year (1779) did not follow this doctrine, but declared that acquired freight (*fret acquis*) already earned on the voyage was insurable, and did not go with the ship on abandonment, but that the freight ultimately earned on the goods saved would go to the insurer, if there was no stipulation to the contrary (*l*). The Code de Commerce originally enacted that the freight of the goods saved (*fret des marchandises sauvées*) vested on abandonment in the abandonee of

(*i*) Com. liv. iii. tit. vi. des Assurances, art. 15.

(*k*) 2 Emerigon, c. xvii. s. 9, p. 256. The whole section deserves an attentive perusal.

(*l*) See Emerigon, *ibid.*

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ship, even though paid in advance (*m*). The meaning of these latter words was the subject of litigation before the French tribunals, and it was expressly decided by the Cour de Cassation (*n*) that they related only to such portion of the freight of the goods ultimately saved as might have been paid in advance under the stipulations of the charter-party; that the only freight passing by abandonment to the insurer on the ship, was the freight of the goods on board at the time of the casualty and ultimately saved; but that the freight of goods landed previous to the casualty, under the terms of the charter-party, and thus earned before the loss, did not vest in the abandonee of ship (*o*). The provision, however, of the Code de Commerce above referred to was expressly repealed by the Law of 12th August, 1885.

Deductions from freight when it vests as salvage.

1181. With regard to the deductions to be made from the freight ultimately earned, when it vests as salvage in the abandonees, the following points have been decided:—

Sharp *v.* Gladstone.

In a case in which ship and freight, on detention under the Russian embargo of 1800, had been severally abandoned to the respective underwriters, and where it was assumed that each set of underwriters were to be considered as in the place of the assured for the respective interests insured, the ship-owner claimed to make the following deductions from the freight ultimately earned before paying it over as salvage to the underwriters on freight, who had settled for and paid him a total loss:—

Deductions claimed.

1. Expenses of shipping the cargo on which the freight was paid, together with port charges and expenses of the ship and crew at St. Petersburg and Elsinore (for payment of Sound duties). 2. Insurance on same. 3. Wages and provisions of master and crew from the time they were liberated in Russia till discharged in Liverpool. 4. Their wages during their detention under the embargo (provisions

(*m*) Art. 386.

(*n*) 14th December, 1825.

(*o*) Blaize *v.* Paris General Ass. Co., referred to by Boulay-Paty, Comment. on Emerigon, vol. ii. p. 260, and cited at length by him in his Droit Mar. tom. iv. pp. 397—417. The whole case is very interesting, and well deserves perusal.

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were found by the Russian government). 5. Charges paid at Liverpool on ship and cargo. 6. Insurance on ship for the homeward voyage. 7. Diminution of ship's value thereon by wear and tear.

Deductions allowed.

With regard to these claims the Court held: 1. That the expenses of shipping on board the homeward cargo, being altogether for the benefit of the underwriters on freight, should fall exclusively on them. 2. That the expenses of ship and crew, and the insurance thereon, the wages and provisions of the master and crew between their liberation from the embargo and the ship's discharge, and their wages during the detention, should be deducted from the salvage, and apportioned between the two sets of underwriters according to their respective interests. The wages during the detention, Lord Ellenborough intimated, might come into general average. 3. The charges on ship and cargo in the port of discharge, the cost of insuring the ship for her homeward voyage, and the diminution of her value thereon by wear and tear, the Court held must be struck out, as they could not be charged on the freight (*p*).

Barclay v. Stirling.

In another case, where, the ship having been cast away in the course of the voyage, a separate abandonment was made to both sets of underwriters, but the abandonees of ship, in consideration of the assured's taking less than a total loss, renounced all claim to benefit of salvage, it was held that the underwriters on freight, who had adjusted for and paid a total loss, were entitled to the freight ultimately earned by the repaired ship's arriving with a substituted cargo, after deducting the necessary expenses of loading such cargo on board at the port of repairs, and the wages of the crew during the loading. Any expenses, however, incurred while the ship was detained merely for the purpose of necessary repairs were not to be deducted from the freight, but set to the account of the shipowner, to be made good by the underwriter on ship (*q*).

(*p*) Sharp v. Gladstone (1805), 7 East, 24.

(*q*) Barclay v. Stirling (1816), 5 M. & S. 6.

CHAPTER VIII.

ABANDONMENT.

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1182. In this chapter the term "abandonment" is used, and the effects of abandonment are considered, in relation to cases of constructive total loss. Abandonment is, however, an incident of all cases of total loss, whether actual or constructive. "Whenever there is a contract of indemnity and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity" (*a*). Distinction between abandonment and notice of abandonment.

The law, however, does attach a peculiar incident to cases of constructive total loss under a marine policy by insisting that the assured in order to recover shall not only abandon, but shall also give a proper notice of abandonment. The reasons for this rule have been already explained in the

(*a*) Per Brett, L. J., in Kaltenbach *v.* Mackenzie (1878), L. R. 3 C. P. D. at p. 471.

Sect. 1182. chapter on Constructive Total Loss (*b*). At this point it is only necessary to point out that the expressions "abandonment" and "notice of abandonment" are sometimes used without due regard to the distinction which really exists between them (*c*).

Right to give notice of abandonment formerly discouraged in the English Courts.

1183. A great disinclination was formerly shown by the English Judges to encourage or extend the application of the doctrine (*d*). Lord Ellenborough on one occasion spoke of it as "a desperate risk cast on the underwriter, who is to save himself as well as he can" (*e*); and during the whole time he presided in the Court of King's Bench he uniformly endeavoured to restrain the practice within narrower limits.

The modern tendency of our Courts, however, has unquestionably been to give a reasonable facility and extension to the practice of abandonment; and there can be no doubt that, if restrained within due limits, this practice gives a direct encouragement to mercantile enterprise.

Utility of abandonment.

To all, indeed, who are engaged in commercial speculations, it is of the last importance to have a ready and quick command over their capital, so as to be enabled at once to withdraw it from any adventure that appears likely to be losing, and invest it in another that promises to be lucrative. Suppose, then, a merchant or shipowner to have received information of some marine casualty, such as capture or stranding, which renders the total loss of his property highly probable, but not absolutely certain, what is he to do under such circumstances? To have his funds locked up during the whole time he is waiting the ultimate issue of the accident would be almost as disastrous as the absolute total loss of his property—in fact, more so, for in the latter case he would have an immediate claim on the underwriter for the amount of his subscription.

(*b*) See Kaltenbach *v.* Mackenzie, per Cotton, L. J., at p. 480.

(*c*) *E.g.*, per Lord Ellenborough in Mellish *v.* Andrews (1812), 15 East, 16, "Abandonment is only necessary to make a constructive total loss."

(*d*) See the opinions of Lord Mansfield in Goss *v.* Withers (1758), 2 Burr. 683, and Buller, J., in Mitchell *v.* Edie (1787), 1 T. R. 616.

(*e*) In Bainbridge *v.* Neilson (1808), 10 East, 341.

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The claim, therefore, which he would have a right to make in case of an absolute total loss, the law allows him to make in these cases of probable and highly imminent total loss; it allows him to release himself from his embarrassment, and deal with the underwriters on the same terms as though a total loss had actually occurred, on condition of his abandoning to them all his interest in the subject insured and all his rights of recovering it (*f*).

Meaning of "constructive total loss."

Hence it is that those cases in which alone abandonment is either required or allowed are called cases of constructive total loss, for, although in such cases the total loss is only highly probable, the law by its construction attributes to them the same effect which is attached to cases where the total loss is absolute, viz., that of entitling the assured immediately to demand from the underwriter the whole amount of the insurance (*g*). What amounts to a constructive total loss forms a difficult and intricate matter of investigation.

Notice of abandonment necessary in cases of constructive total loss.

1184. In all cases of constructive total loss, if the assured wishes to be in a position at once to claim the whole amount of the insurance, he must as a necessary preliminary give due notice of abandonment to the underwriters, it being an elementary principle on this subject that "where the thing insured subsists in specie and there is a chance of its recovery, in order to make it a total loss there must be an abandonment" (*h*).

But not otherwise.

The assured, indeed, even in these cases has always his election whether to abandon or not, for there is no rule making abandonment in any case necessary in the abstract, and irrespective of the object of recovering as for a total loss.

"A party," says Lord Ellenborough, "is not in any case

(*f*) Per Lord Mansfield in Goss *v.* Withers (1758), 2 Burr. 683; Hamilton *v.* Mendes (1761), *ibid.* 1127.

(*g*) 2 Boulay-Paty on Emerigon, c. xvii. s. 2, p. 217.

(*h*) Per Lord Ellenborough in Tunno *v.* Edwards (1810), 12 East, 491; and see the judgment of the House of Lords in Fleming *v.* Smith (1848), 1 H. L. Cas. 535; and that of the Court of Queen's Bench in Knight *v.* Faith (1850), 15 Q. B. 659.

Sect. 1184. obliged to abandon, neither will the want of abandonment cost him [illegible] for that which is in fact either an average or a total loss, as the case may be." "Where there is an abandonment, the risk is thrown upon the underwriters; where there is none, a party takes the chance of recovering according to his actual loss. Abandonment is only necessary to make a constructive total loss" (*i*).

In cases of absolute total loss it is nugatory.

It is only, indeed, in cases where the assured wishes to recover the whole amount of the insurance, upon the occurrence of a loss which does not produce the absolute destruction of the thing insured, that a notice of abandonment is either necessary or allowable (*k*). In cases of absolute total loss it is considered, as we shall presently see, to be a mere idle ceremony.

In cases of partial loss inoperative.

And in cases of partial loss, however great may be the amount of the damage, it is wholly inoperative; for it is a fixed principle in this branch of the law that no merely partial loss—no loss, that is, which neither immediately produces, nor ultimately tends to produce, the total destruction or privation of the thing insured—can be converted into a constructive total loss by means of abandonment (*l*). "There is not any principle," says Lord Ellenborough, "which authorizes an abandonment, unless where the loss has been actually total, or in the highest degree probable at the time of the abandonment" (*m*).

An abandonment must be

1185. One of the first principles in this branch of Insurance

(*i*) Per Lord Ellenborough in Mellish *v.* Andrews (1812), 15 East, 16. See also per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 287; Woodside *v.* Globe Mar. Ins. Co., [1896] 1 Q. B. 105; Lohre *v.* Aitchison (1877—1879), 2 Q. B. D. 501; 3 Q. B. D. 528; 4 App. Cas. 755.

(*k*) Under some circumstances an assured may be entitled to recover the whole amount insured as particular average, *e.g.*, in the case of an undervalued ship. See The St. Johns (1900), 101 F. 619. The underwriter cannot insist on abandonment, even after payment of the whole amount of the insurance, unless the payment has been for a total loss: *ibid.*

(*l*) Cazalet *v.* St. Barbe (1786), 1 T. R. 187; Fleming *v.* Smith (1848), 1 H. L. Cas. 514.

(*m*) In Anderson *v.* Wallis (1813), 2 M. & S. 240.

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Law is that an abandonment by the assured must extend to his whole interest in the thing insured, as far as that interest is covered by the policy.

of the entire interest covered.

Thus, where a single policy of insurance is effected on ship and cargo "indiscriminately," *i.e.*, where a gross sum is insured on the two interests jointly, without distinctly specifying how much is insured on each separately, it is stated by Emerigon that neither the ship nor the cargo can be separately abandoned (*n*).

But where it is specified in the policy that part of the whole valuation is to apply to the ship and part to the goods, and no goods have in fact ever been loaded on board, but the risk is run on the ship only, the ship alone may be abandoned; but the assured can only recover to the extent of the valuation on the ship (*o*).

So, where a cargo consisting of different classes of merchandise is insured in a single policy for one gross sum, the insurance is one and entire, and the abandonment consequently must extend to the whole cargo. Thus, if 1,000*l.* be insured "on goods" generally, and the goods in fact consist partly of sugars and partly of indigoes, the assured cannot, in case of wreck or other constructive total loss, abandon his sugars and retain his indigoes, or *vice versâ* (*p*).

So, where one sum is insured indiscriminately on a general class, as "goods," no portion can be separately abandoned.

If, however, a specific and distinct sum be insured on each kind of commodities, as "1,000*l.* on the sugars and 1,000*l.* on the indigoes," each may be separately abandoned (*q*).

Except where a distinct sum is insured on each distinct kind.

1186. Marshall has gone further, and said that if the several kinds of commodities are each separately valued in the policy they may each be separately abandoned, even

(*n*) 2 Emerigon, c. xvii. s. 8, p. 250. This position seems on principle to be correct, though Phillips (s. 1659) considered the point as doubtful; and see Amery *v.* Rodgers (1794), 1 Esp. 208.

(*o*) Amery *v.* Rodgers (1794), 1 Esp. 208.

(*p*) Est unica assecuratio omnium mercium. 2 Emerigon, c. xvii. s. 8, p. 249. So in the United States in case of a general insurance on a cargo consisting of beef, butter, soap, candles, apples and potatoes. Guerlain *v.* Col. Ins. Co. (1811), 7 Johns. 527, cited 2 Phillips, Ins. s. 1660.

(*q*) *Ibid.*

Sect. 1186. though a specific and distinct sum may not be insured upon each (r). Accordingly, in the United States, where one gross sum was insured "on 150 boxes of sugars valued at 6,000*l.*, five hampers of mace valued at 5,000*l.*, and four tons of logwood valued at 250*l.*," it was held that the assured might abandon each article separately (s).

This rule was doubted by Phillips, who contends that the insurance in such case is one and entire, though the valuation is distinct, and that consequently the abandonment ought to be entire also (t). In this country, however, there seems little doubt that the rule as laid down by Marshall is that to be acted upon, especially in cases where perishable commodities are shipped in separate packages; when, as we have seen, the insurance is in practice taken to be distinct on each species, even without a special clause to that effect (u). Chancellor Kent, after noticing the doubt raised by Phillips, thus cautiously lays down the rule:—"Unless the different sorts of cargo be so distinctly separated and considered in the policy as to make it analogous to distinct insurances on distinct parcels, there cannot be a separate abandonment of part of the cargo insured" (x).

If there be two separate policies upon constituent parts of the same cargo, it is hardly necessary to say that there may be an abandonment of either part separately, though both policies are effected with the same set of underwriters (y).

Abandonment only operates up to the extent of the insurance.

1187. Abandonment, however, cannot transfer the interest of the assured any further than that interest is covered by the policy (z). Accordingly, where a general insurance has been effected "on cargo" to a certain amount, and the value of the interest at risk becomes increased by fresh goods being taken on board in exchange for the original cargo (as in the course of a bartering voyage), in such case, if a loss occurs which

(r) 2 Marshall, Ins. 612.
(s) Deidericks *v.* Commercial Ins. Co. of New York (1813), 10 Johns. 234.
(t) Ins. vol. ii. s. 1661.
(u) See Stevens, Average, 237.
(x) Com. vol. iii. p. 329.
(y) 2 Emerigon, c. xvii. s. 13, p. 271.
(z) Boulay-Paty, Droit Mar. 286.

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gives a right to abandon when the cargo at risk is double the original value, that which will be thereby transferred to the underwriter as salvage is not the whole of the cargo at risk at the time of the loss, but only half thereof, or the value at risk at the time of the insurance and covered by the policy (*a*). It appears equally clear that where a ship is only partially insured, so that her owners remain to some extent "their own underwriters," the effect of a notice of abandonment will be to make the owners and the underwriters joint tenants of the property, in the proportion which the amount uninsured bears to that insured.

So clearly is the general rule established, that if the underwriters demand an abandonment of more than is insured, this will not prevent the assured from abandoning up to the extent of the sum insured, and, having done so, recovering as for a total loss (*b*).

It must also be remembered that an abandonment only relates to the property actually at risk at the time of the disaster; if, therefore, in the course of the voyage, a part of the goods originally insured have been landed and sold before the occurrence of the casualty, the abandonment does not relate to them, but only to the goods on board at the time of the loss (*c*). In such case the assured, on the one hand, can make no claim against the underwriters in respect of the goods so landed, and, on the other hand, is only bound to abandon the goods which were actually at risk when the loss occurred (*d*).

Every abandonment must be absolute and unconditional.

1188. An abandonment must operate not only as a transfer of the whole interest of the assured in the subject of the insurance, but it must be such as to effect that transfer absolutely and unconditionally. "Every abandonment," says Valin, "must be pure and simple and not conditional, other-

(*a*) Pothier, d'Assurance, No. 133.

(*b*) Havelock *v.* Rockwood (1799), 8 T. R. 268. But such demand is no waiver of notice of abandonment. *Ibid.*

(*c*) 2 Emerigon, c. xvii. s. 8, p. 250.

(*d*) 4 Boulay-Paty, Droit Mar. 289.

... will not act as a transfer of ownership, which is of ... of abandonment" (e).

... follows that no one can be entitled to make an ... who has not at the time of the loss an absolute ... in the subject insured.

... has been decided in the United States that where ... has abandoned all his interest to one set of under- ... abandon to other underwriters ... And again it has been there held ... by mortgaging his ship, has voluntarily ... the power of conveying an absolute title, ... to the underwriters on ship, but can ... the damage he has actually sustained as a ... But by the British statute the mortgagor ... an absolute title, subject only to ... appearing on the registry (h). And one ... the insurance for all the others ... give notice of abandonment for ... a question of agency (i).

... insured with different underwriters, of ... abandonment, but others, after ... resist a claim for a con- ... that the former become in some ... owners in the vessel in the proportion ... subscribed by them bears to her full value. ... what their exact legal position in such a

... Assurances, ... See also 2 Emerigon, ... in this country ... according to Lord ... the property in ... Registry Acts prevent ... this property except ... the owners, how- ... abandonment trus- ... the underwriters. Lord ... Scottish Mar. Ins. Co. v. ... 1 Macq. H. L. Cas. ... have elsewhere suggested ... underwriters, by disclaimer or otherwise, may refuse to become owners of the abandoned property and so escape the liabilities attaching to such ownership.

(f) Higginson v. Dall (1816), 13 Mass. 96; 2 Phillips, s. 1516.

(g) Gordon v. Massachusetts Fire and Marine Ins. Co. (1824), 2 Pick. (Mass.) 249.

(h) Merchant Shipping Act, 1894, s. 34.

(i) Hunt v. Royal Exch. Ass. Co. (1816), 5 M. & S. 47.

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case would be. A British ship can only be owned in 64th shares, but if underwriters to the extent of 5,000*l.* on a vessel worth 25,000*l.* settle as for a constructive total loss, although they are entitled to the ownership to the extent of one-fifth, how can legal effect be given to their rights? A case of partial acceptance of a notice of abandonment was that of the "Krishna," before the Court of Session in Scotland. The vessel was stranded in 1879; her value was 9,000*l.*; she was insured with one set of underwriters for 8,000*l.* and with the plaintiff for 500*l.* The plaintiff accepted notice of abandonment, but the judgment against the 8,000*l.* underwriters was for a partial loss only (*k*), and the vessel was afterwards repaired at a cost of 20 per cent. on her value. In 1883 the plaintiff brought an action to recover from the shipowners the portion of the value of the vessel to which his acceptance of the notice of abandonment entitled him. It was held that he was entitled to recover one-eighteenth of her value—*i.e.*, the proportion which 500*l.* bore to 9,000*l.*—less the 20 per cent. which her owners had spent on repairs. It was impossible in this case to constitute him the actual owner of any part of the vessel, inasmuch as her owners had recently mortgaged her to an extent exceeding her value (*l*).

Consignee of bill of lading.

Whether the consignee of a bill of lading has a right to make abandonment of the goods depends on the question whether the possession of the bill of lading gives him a right to absolute and unconditional possession of the goods. In several cases, indeed, tried before Lord Ellenborough, which arose on the American embargo of 1807, and in which it appears that the consignees in England of the bills of lading had abandoned goods detained by that embargo, Lord Ellenborough thought it might be difficult to make out that they had such an interest as would entitle them to abandon, because they were to have no control over the goods till their arrival; his Lordship, however, gave no decision on the

(*k*) See Shepherd *v.* Henderson (1881), 7 App. Cas. 49.

(*l*) Whitworth *v.* Shepherd (1883), 12 Ct. of Sess. (4th Ser.) 204.

Sect. 1188. express point, and the cases were decided against the right of the consignees on other grounds (*m*).

Form of notice of abandonment.

1189. No precise form is required for a notice of abandonment; nay, it is not even necessary that it should be in writing (*n*), though in point of fact it generally is so.

No precise form requisite, but must be direct and unequivocal.

Whether given orally or in writing it is an indispensable requisite that it shall communicate unequivocally, and in plain terms, that the assured offers to abandon to the underwriters all his interest in the thing insured. Lord Ellenborough, indeed, went so far as to say: "The abandonment must be direct and express, and I think the word 'abandon' should be used to make it effectual." In the case then before the Court the broker had communicated to the underwriters that the voyage had been broken up by the capture of the ship and cargo, and requested them to settle as for a total loss, and to give directions as to the disposal of the ship and cargo. Lord Ellenborough held this not to be sufficient as a notice of abandonment (*o*).

Notice of Bombay Native Ins. Co. v. Ins. Co.

The Privy Council, however, have disapproved of this decision, in a case in which the notice given was in these terms: "With regard to the 'Northland,' we regret to say that she is a total wreck, and we have hereby to give you notice that we shall claim payment of the policies we hold against her cargo and disbursements." Counsel for the insurers, with the express approval of the Court, admitted upon argument that this notice was sufficient (*p*).

Thellusson v. Fleming

But where the broker showed the underwriter a letter from the assured, merely stating that the ship had been forced ashore and a quantity of sugars damaged, and the underwriters thereupon desired that the assured would do the best

(*m*) Conway *v.* Gray (1809), 10 East, 536, and cases there cited.

(*n*) Parmeter *v.* Todhunter (1808), 1 Camp. 542; see also Read *v.* Bonham (1821), 3 Brod. & Bing. 147. Lord Ellenborough considered that it would have been well to prevent oral notices of abandonment entirely, but admitted that in practice they were held to be operative.

(*o*) Parmeter *v.* Todhunter (1808), 1 Camp. 542.

(*p*) Currie *v.* Bombay Native Ins. Co. (1869), L. R. 3 P. C. 72.

he could for the damaged property, this was held by Lord Kenyon to be an insufficient notice of abandonment (*q*). Sect. 1189.

In a later case the letters of the captain, a part-owner, were shown, as they arrived, by the other part-owners to the underwriter, and among them, one stating his intention to abandon, and that he had abandoned the ship and had sold her; and, in a postscript, adding, "give the underwriters due notice"—meaning, as the Court construed it, of abandonment—this was held to be sufficient notice of abandonment (*r*). King *v.* Walker.

1190. Though a demand for a total loss in itself does not in this country operate by implication as a notice of abandonment, yet such a demand, followed by payment as for a total loss, is evidence that an offer of abandonment has been made and accepted (*s*).

In the United States the Courts have been less rigorous, and have held that where the nature of the transaction is such as to leave no reasonable doubt of the intention of the assured to abandon, and of that intention being understood by the underwriters, it shall be implied that a proper offer of abandonment has been made, though no formal notice can be proved to have been given (*t*).

The notice of abandonment ought to contain, or be accompanied with, a short statement of the grounds of abandon- The grounds of abandonment should be sent with the notice.

(*q*) Thellusson *v.* Fletcher (1793), 1 Esp. 72.

(*r*) King *v.* Walker (1864) (in error), 33 L. J. Ex. 325, reversing on this point the judgment below: *ibid.* 167; 2 H. & C. 384; 3 *ibid.* 209.

(*s*) Houstman *v.* Thornton (1816), Holt, N. P. 242. See as to notice of dishonour in case of a bill of exchange, Woods *v.* Dean (1862), 32 L. J. Q. B. 1; Cordery *v.* Colville (1863), 32 L. J. C. P. 210.

(*t*) Thus, in the Supreme Court of the United States, a letter to the underwriters, containing a statement of the loss and subsequent sale of part of the property, and also a claim for the balance of the amount insured, less the salvage, was held to be a sufficient notice of abandonment. Patapsco Ins. Co. *v.* Southgate (1831), 5 Peters, 604. So payments made upon a claim for a total loss have been held there to waive all defects and form of notice. Watson *v.* Ins. Co. of North America (1803), 1 Binney, R. 47. So the underwriters calling for papers to prove a total loss after claim made. Calbreath *v.* Gracy (1805), 1 Wash. C. C. R. 219. See cases collected, 2 Phillips, ss. 1680 and following.

Sect. 1190. ment, in order that the underwriters may determine whether to accept it or not; and in the United States it has been held (but not in this country) that the assured cannot avail himself of any other grounds of abandonment than those so stated (*u*).

No deed of cession requisite to complete the abandonment.

Supposing a notice of abandonment to have been duly given, no deed of cession or formal transfer is necessary to enable the assured to perfect his abandonment and recover as for a total loss. A valid notice, in case it be accepted, or the loss continue total down to the time of action brought, operates in fact as a complete transfer of property at the date of the notice, except where the Registry Acts of Shipping interpose a barrier, and even then the registered owner becomes immediately trustee for the underwriters (*x*).

Notice of abandonment unnecessary where there is nothing which upon abandonment can pass to underwriters.

1191. Notice of abandonment is not necessary in cases where there is nothing which the assured can abandon, so that the underwriters, even if they received the notice, would not be able to avail themselves of it. "I think," said Blackburn, J. (*y*), "it is from the nature of things confined to cases where there are some steps which the underwriters could take if they had notice . . . If there was nothing they

(*u*) See Suydam *v.* Marine Ins. Co. (in error), 2 Johnson, 138, and the other cases collected, 2 Phillips, s. 1684. It appears, however, exceedingly doubtful whether this would be so held in England: with us the great criterion of the right to recover as for a total loss is the state of the property at the time of action brought. Supposing it then to be in such a state as to give a right to abandon, the assured might recover for a total loss, although the original ground of abandonment had then ceased to exist. If, however, the rule as above laid down in the United States only means that the grounds stated in the notice of abandonment must at some time really have existed, and that unless they have done so the notice is invalid, the law here would, it is conceived, be exactly the same as it is there.

(*x*) Cf. the Merchant Shipping Act, 1894, s. 34, and per Lord Truro in Scottish Mar. Ins. Co. *v.* Turner (1853), 1 Macq. H. L. Cas. 342.

(*y*) In Rankin *v.* Potter (1873), L. R. 6 H. L. at p. 124. See also per Lord Chelmsford at p. 155: and Trinder & Co. *v.* Thames, &c. Ins. Co., [1898] 2 Q. B. at p. 131. In the latter case the somewhat stricter rule laid down by Brett, L. J., in Kaltenbach *v.* Mackenzie 3 C. P. D. at p. 475), is reconciled with the rule elsewhere laid down by denying its applicability to cases of constructive total loss of freight: per Smith, L. J., at p. 132.

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could do, no notice is required." The commonest case where this doctrine applies is where there has been a constructive total loss of ship or of cargo, such as to prevent any freight being earned upon the voyage insured, which freight is thus totally lost. Perhaps the true way of putting the case under these circumstances is to say that in such an event there is not merely a constructive but an absolute total loss of freight, and this seems to have been the view of Brett, J. (*z*). But whether we prefer to regard it as a case of absolute or of constructive total loss, it is clear that the real reason why no abandonment is necessary is because the notice of abandonment would in such a case be merely a vain and useless form.

Consequently, where a ship was chartered in this country to bring home a cargo from Calcutta to London, and a policy was effected on that homeward freight but to cover the outward voyage from Clyde to New Zealand and thirty days after arrival there, and a constructive total loss of ship occurred during the currency of that policy, as the owner was not bound in these circumstances to repair his ship and did not do so, there was a total loss of the homeward freight and nothing to abandon, so that notice of abandonment would have been unmeaning and was held unnecessary (*a*). So, if the assured learn at the same time of the damage to ship or goods and of their justifiable sale, there is then nothing which he can abandon and a notice is unnecessary (*b*).

On the contrary, abandonment must be resorted to and notice thereof must be given if there be anything to abandon, "as, for instance, in the case of freight where the cargo is already on board, and the shipowner would have the right of sending it on to its destination in another ship and so earning freight" (*c*).

Similarly it has been decided that upon a constructive total

(*z*) L. R. 6 H. L. at p. 102.

(*a*) Rankin *v.* Potter, *supra*.

(*b*) Farnworth *v.* Hyde (1866), 18 C. B. N. S. 835; Roux *v.* Salvador (1836), 3 Bing. N. C. 266; Mullett *v.* Shedden (1811), 13 East, 304; Mellish *v.* Andrews (1812), 15 East, 15.

(*c*) Per Cockburn, C. J., in Potter *v.* Rankin (1870) (*coram* Ex. Ch.), L. R. 5 C. P. 341, 371; and per Brett, J., L. R. 6 H. L. at p. 102,

Sect. 1191. loss of ship, no notice of abandonment need be given by the original underwriters to underwriters on a policy of re-insurance (*d*). The reason for this, as given by Phillips (*e*), is that the re-assured has nothing to abandon until and unless he accepts the abandonment of the assured, and to compel him in all cases to do so would be to the disadvantage, and not to the advantage, of the re-assurer.

Time within which notice of abandonment must be given.

1192. As the effect of a valid notice of abandonment (unless counteracted by the subsequent recovery of the property before action brought) is to give the underwriters a title to the abandoned property (or salvage); and as the ultimate value of such property may be considerably affected by the promptitude with which measures are taken to effect either its sale or recovery, it is obviously just that the assured, if he means to abandon, and thereby throw upon the underwriters the ownership of the thing insured, should give them notice of his intention to do so within a reasonable time after receiving intelligence of the loss, in order that they may take immediate steps for turning the property thus cast upon their hands to the best account (*f*). The great practical difficulty, however, has been to lay down any rule as to the time which the assured shall be allowed for making up his own mind whether he will abandon or not.

There is no fixed rule.

The cases, in fact, show that there is no fixed rule in this country on this subject, but that what shall be considered reasonable time for this purpose must depend, in some degree, upon the certainty of the news of the disaster, and upon the nature of the casualty itself.

(*d*) Uzielli & Co. *v.* Boston Marine Ins. Co. (1884), 15 Q. B. D. 11, C. A.

(*e*) Ins. vol. ii. s. 1506. Notwithstanding the decision of the Court of Appeal, which appears to be simply based on Phillips' reasons, and on an American decision in accordance therewith, it is a little difficult to see why the re-assured, on receiving notice from the original assured, should not be bound to give a similar notice to their re-insurers. Inasmuch as a notice of abandonment properly given vests the property in the insurer as from the date of the notice, to say that the re-assured has nothing to abandon seems rather to beg the question.

(*f*) Per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 281.

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If the intelligence is certain, notice ought to be given immediately.

Firstly: If the intelligence is certain, and the disaster one such as capture, arrest, or detention, which is manifestly, *primâ facie*, a constructive total loss as long as it continues, though the time it may continue is uncertain, the assured ought to give notice of abandonment immediately upon receipt of the intelligence.

If doubtful, the assured has more time.

Secondly: If, on the other hand, the information be doubtful, or the casualty of such a description that it does not necessarily, and *per se*, give a right to abandon—as in the case of the stranding or partial wreck of the ship, or the damage done by sea-water to perishable goods—the assured may wait a reasonable time for more accurate information as to the nature of the loss, or the actual extent of the damage.

Only in order to verify the intelligence or ascertain the real nature of the loss, can delay be allowed.

For these two purposes alone can any delay be allowed him: he may not delay in order to observe the state of the markets (*g*); for any profit which may ultimately be made in this way ought, in justice, to belong to the underwriters: neither can he lie by and treat the loss as an average loss, until the recovery of the property becomes hopeless, and then give notice of abandonment; for the underwriters are of right entitled to all those chances of recovery, which might arise from the speediest and most immediate endeavours for that purpose; in fact, in the words of Lord Kenyon, he must "make his election speedily whether he will abandon or not, and so put the underwriters in a situation to do all that is necessary for the preservation of the property, whether sold or unsold" (*h*).

Election to claim a partial loss is final.

Where the owners of a ship, lying sea-damaged in a foreign port, have once elected to treat the loss as partial, they cannot afterwards turn it into a total loss, by virtue of a notice of abandonment, merely because they find on the ship's arrival that the cost of her repairs is more than she will fetch in the market (*i*).

(*g*) Gernon *v.* Royal Exch. Ass. (1815), 6 Taunt. at p. 387; Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. at p. 480, per Cotton, L. J.

(*h*) In Allwood *v.* Henckell (1795), 1 Park, 399; cf. Stringer *v.* English, &c. Ins. Co. (1869), L. R. 4 Q. B. 676; 5 *ibid.* 599.

(*i*) Fleming *v.* Smith (1848), 1 H. L. Cas. 514.

Sect. 1192. Of course, if the assured is not proved to have had intelligence of the loss until nothing is left to abandon, no defence founded on his not having given notice of abandonment at all, or in due time, can be a bar to his claim for a total loss (*k*).

Undue delay after certain intelligence.

1193. First: where, in the case of an insurance on perishable goods, "free of average," the ship was compelled to put back in distress, and, after two surveys, was condemned as irreparable: Lord Ellenborough held, that a notice of abandonment not given to the underwriters till five days after the assured knew of the condemnation of the ship, was too late (*l*).

So where, in an insurance on ship, a delay of sixteen or seventeen days elapsed after the result of a final survey was known, before notice was given, such notice was held too late (*m*).

In order, however, to make it appear that there has been a *laches* on the part of the assured, it must be shown that he had full means of being informed of the real state of the loss, at the time when it is contended that he ought to have given notice of abandonment. Hence, where the owner of an East Indian ship, which had been sold as irreparable at Calcutta, gave notice of abandonment three days after he had received the first accurate information of the loss, that was held sufficient, although it appeared that the captain of the ship had arrived in London, where the owner resided, ten days previously, and probably might, but was not proved to, have communicated to the owner, on his arrival, the facts of the loss (*n*).

1194. Lord Ellenborough and the Court of King's Bench

(*k*) Abel *v.* Potts (1800), 3 Esp. 242; Rankin *v.* Potter (1873), L. R. 6 H. L. 83.

(*l*) Hunt *v.* Royal Exch. Ass. Co. (1816), 5 M. & S. 47.

(*m*) Aldridge *v.* Bell (1816), 1 Stark. 498.

(*n*) Read *v.* Bonham (1821), 3 Brod. & Bing. 147. It is the view, however, of the editors that in cases of justifiable sales no notice of abandonment is necessary.

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held, in two successive cases, that where the ground of abandonment was the ship's seizure and detention, the assured was bound to give notice immediately on first receiving intelligence of the seizure and detention (*o*).

Thus, where a ship and cargo were seized in a foreign port on the 7th of December, 1810, and the assured first heard of the seizure on the 8th of January, 1811, but did not give notice of abandonment till nine days after—Lord Ellenborough thought that the notice was given too late to entitle the assured to recover for a constructive total loss, but as the cargo, in which alone the assured was interested, was finally condemned on the 30th of April, the Court subsequently held that the assured could recover for an actual total loss (*p*).

Fleming v. Smith.

A ship having been compelled by sea-damage in May, 1842, to put into the Mauritius to refit, the master wrote to his owners, telling them of the damage sustained, of the necessity for extensive repairs, of his intention to borrow money on bottomry, and of the sum required for that purpose. These letters were received at intervals between September and December, 1842. The owners wrote in answer to the master, approving of the course he proposed to take. On the 27th of March, 1843, the ship arrived, and was at first taken possession of on behalf of the owners. It being soon found, however, that the cost of repairs would much exceed her market value, the owners abandoned her on the 30th of March. It was held, that under the circumstances this abandonment was too late (*q*).

A ship at the port of Saigon had become a constructive total loss, and one of her owners residing at Singapore, and possessing adequate authority to abandon, received certain intelligence of the ship's condition on the 7th February; after that date he ordered the master to have her sold, and then, on the 11th March following, notice of abandonment

(*o*) Mullett *v.* Shedden (1811), 13 East, 304; Mellish *v.* Andrews (1812), 15 East, 13.

(*p*) Mellish *v.* Andrews (1813), 15 East, 13.

(*q*) Fleming *v.* Smith (1848), 1 H. L. Cas. 514.

Sect. 1194. was given to the underwriters in London; it was held that notice of abandonment had not been given in due time (*r*).

It was suggested in that case that the telegraph ought to have been used immediately after the day on which the condition of the ship was definitely known, if a telegraph to Europe existed; and if there were no telegraph, then that notice should have been sent by the next post (*s*).

From these cases, then, it appears that in this country the assured is bound to give notice of abandonment immediately on first receiving intelligence which is certain and definite, as, for instance, of capture, detention, or disability, without waiting to see the further issue of the casualty. If under such circumstances the assured elect to delay, with a view to the advantage to be derived from recovery of the property and the completion of the contract of affreightment, he treats the loss already suffered as a partial loss, and cannot afterwards, under the same circumstances, abandon and claim for a total loss.

Revival of the right to give notice.

1195. A change of circumstances, however, may revive the right of abandonment and of giving notice accordingly. And there may be cases in which a mere protraction of time during which an assured is kept out of possession of his property may amount to such a change of circumstances as will operate such a revival.

The case in which these questions were agitated was this:—The plaintiffs, in 1863, had effected a policy with the defendants for 5,000*l.* on goods valued at 11,500*l.*, by the "Dashing Wave," from Liverpool to Matamoras; and during the continuance of the risk the ship was seized on the 5th November, 1863, by a United States cruiser and carried into New Orleans, where the cargo was libelled in the Prize Court as lawful prize. Instead of abandoning, as they might have done, on hearing of this casualty, the plaintiffs intervened in the suit. On the 16th June, 1864, the Court

(*r*) Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. 467.
(*s*) *Ibid.* 477, 478.

gave judgment against the captors and decreed restitution. On the 1st July, the captors appealed; the decree for restitution was suspended; and on the 12th of the following September, the plaintiffs gave defendants notice of abandonment, which was not accepted. From that time onwards, the defendants were kept informed by the plaintiffs of the events as they occurred, and were asked in December, 1864, and again in February, 1865, to give bail for the cargo, as otherwise it would be sold. The plaintiffs themselves refused to give bail, under circumstances affecting the money currency of the United States such as made their refusal appear to the English judges not unreasonable, and on the 25th May, 1865, under an order of the Prize Court, the cargo was sold. Notice of abandonment to the defendants was thereupon renewed by the plaintiffs, who forthwith commenced their action on the policy. The judges, both in the Queen's Bench and in the Exchequer Chamber, appear to have thought that there might be such a change of circumstances affecting the subject insured, as would revive the right to abandon, but being of opinion that the plaintiffs were justified by the circumstances in not putting in bail, the Courts held that the sale by order of the Prize Court amounted in law to an absolute total loss, rendering abandonment therefore unnecessary (*t*). Sect. 1195.

In the United States. In the United States the question appears to have frequently arisen and to have been decided, not only in cases of capture and detention, but in cases of stranding, submersion, and other disaster, in favour of such a revival of the right under an adequate change of circumstances affecting the subject insured (*u*).

If information uncertain, or the casualty indecisive, reasonable time allowed. **1196.** Secondly: If the information itself be uncertain, or the nature of the casualty such that the assured cannot be expected to make up his mind as to the expediency of aban-

(*t*) Stringer *v.* English, &c. Mar. Ins. Co. (1869), L. R. 4 Q. B. 676; *ibid.* 5 Q. B. 599. This case is cited with approval by Blackburn, J., before the Lords in Rankin *v.* Potter (1873), L. R. 6 H. L. 116.

(*u*) 2 Phillips, Ins. ss. 1669, 1672, 1674.

Sect. 1196. judgment without an opportunity of first ascertaining the nature and extent of the damage, reasonable time ought to be allowed him for that purpose; and a notice of abandonment will not be held too late which is not delayed longer than may be necessary for making such an investigation to be made (x).

Thus, where some time was necessarily spent after the ship's arrival in ascertaining the state of a damaged cargo, the notice of abandonment was not held to be too late because postponed till after such survey was completed; for, as Gibbs, C. J., said, "It is perfectly true that the insured are bound to make their election in the first instance, whether they will consider the loss as a partial loss and keep the goods, or as a total loss and give them up to the underwriters. That is the law in all cases where the insured have an option to abandon or not. But it is equally true that by the first instance is meant the earliest opportunity after they have examined into the state of the cargo; and they must have an opportunity of doing that, because it is only by the result of that examination, that their decision can be ultimately determined" (y).

The assured cannot lie by in order to ascertain whether it will be most for his advantage to abandon or not.

1197. But, such postponement of notice being for the sake of investigating the real state of the damaged property, the right to delay ceases upon the accomplishment of that object (z).

"Let it not be supposed," says Gibbs, C. J. in the case just cited, of Gernon *v.* Royal Exchange Co.), "that I accede to the proposition that the assured may use this latitude as an opportunity to judge of the state of the markets, and, as the markets fall or rise, to elect whether he will abandon or not. He has no right to govern his conduct by any such rule: the only examination he may

(x) See the observations of the Privy Council in Currie *v.* Bombay Native Ins. Co. (1869), L. R. 3 P. C. 79.

(y) Gernon *v.* Royal Exch. Ass. Co. (1815), 2 Marshall, R. 88; *S. C.*, 6 Taunt. 383.

(z) Per Dallas, C. J., in Hudson *v.* Harrison (1821), 3 Brod. & Bing. 106.

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make is into the actual state of the cargo, to ascertain what is the degree of damage, without reference to the state of the markets" (*a*).

Thus, where the assured on goods, upon hearing that they had been sold under a Vice-Admiralty decree abroad, for the benefit of whom it might concern, immediately sent out powers of attorney to remit the proceeds home; but four months afterwards, finding the sales less productive than he expected, gave notice of abandonment: this notice was held too late (*b*).

So, where the proceeds of goods were received by a person to whom for three years the assured continued to look for payment, without giving any notice of abandonment, and then only gave such notice when they ascertained that the party to whom they had so given credit had become insolvent: this notice was held too late (*c*).

So, where a ship laden with wheat was partially sunk, and the assured, instead of abandoning immediately on receiving this intelligence, first employed themselves for nearly a month after the loss in getting out the wheat on their own account, and then, when nearly the whole of it was got out, on finding it more damaged than they expected, gave notice of abandonment, Lord Ellenborough and the whole Court held the notice too late (*d*). "Must not the assured," says his Lordship, "abandon in due time, while, for all that appears, the loss continues total in that sense" (*i.e.*, constructively total); "as if, in this case, the assured had abandoned while the thing insured continued under water. Now, here it was three weeks or nearly a month before the abandonment, and

(*a*) Gernon *v.* Royal Exch. Ass. Co. (1815), 6 Taunt. 387. The rule is the same in the United States; Livermore *v.* Newburyport Marine Ins. Co. (1804), 1 Mass. 281.

(*b*) Allwood *v.* Henckell (1795), 1 Park, 399. Lord Kenyon inclined to think that an abandonment was necessary in this case, just as if the property had not been sold.

(*c*) Mitchell *v.* Edie (1787), 1 T. R. 608, as explained by Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. at pp. 288—290; Saunders *v.* Baring (1876), 34 L. T. 419; 3 Asp. M. L. C. 133.

(*d*) Anderson *v.* Royal Exch. Ass. Co. (1805), 7 East, 38; and see Fleming *v.* Smith (1848), 1 H. L. Cas. 514.

Sect. 1197. all the intermediate time the assured took it the ship and cargo, and worked it at his own account."

Upon the same principle, where the voyage is delayed or broken up, but the property saved, the owner must give notice of abandonment in the first instance, and cannot first wait to see whether he can prosecute the adventure, and then elect to abandon when he finds that he cannot. Hence, where a ship in which she had been insured from New York to Havre was carried into a British port and kept there till Havre was declared by the British Government in a state of blockade, a notice of abandonment was held too late which was not given till five weeks after the notification of the blockade, "the latest event," Lord Ellenborough said, "to which the loss" that gave the right to abandon, "is capable of being referred" (e).

Effect of delay due to default of owner or master.

1198. A question of a very mixed description arose out of the facts respecting the "Sir W. Eyre" (f). She had sailed from Greenock for Dunedin in New Zealand, and touched, by permission, at Bluff Harbour, where she grounded, and was got off after a time, not without difficulty, and, it was feared, considerable damage. She then proceeded to Dunedin and was surveyed there, as far as was possible where there was neither slip nor dry dock, and as it could not be ascertained what injury had been done to her, she was temporarily repaired, and would thereupon have prosecuted her voyage to Calcutta, had not the master been without funds to meet his expenses amounting to 1,000*l.* at Dunedin. Quite half of that amount was owing to default of the owner or master under the Passenger Acts. The ship, after being detained for nine months waiting for remittances from Europe, at length sailed for Calcutta. Upon her arrival there her injuries were ascertained to be such, and the expense of repairing her so great, that the master was entirely justified in giving notice of abandonment to the underwriters. But

(e) Barker v. Blakes (1808), 9 East, 283.

(f) Potter v. Campbell (1868), 16 W. R. 401.

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now, whether it was still open to him to give such notice was the question which the Court determined in the negative.

Willes, J., in delivering the judgment of the Court of Common Pleas, says, "We admit that this is not a question of hours or even of days, but whether there was substantial delay out of the ordinary course of maritime affairs. We do not go on the mere lapse of time, we must look for something more substantial, in order to see whether the delay will excuse the underwriters. I think the argument may very well be stated as one which recommends itself by its equity, that not only all the reasonable incidents of maritime adventure may be taken into account in determining the question of what is reasonable time, but also that you may, in each particular case against the underwriters, take into account all the consequences that flow from the damage upon which the question arises. . . . She was detained at Dunedin for nine months, in respect of disbursements of upwards of 1,000*l.*, only one-half of which is imputed to the account of the underwriters; of the rest a great proportion was to be traced to the default of the owner or master; for example, penalties for breaches of the English Act, percentage of passage money ordered to be returned, and the like. The delay was for the want of money to meet these disbursements. It seems impossible to arrive safely at the conclusion that the ship would have been detained nine months in New Zealand if she had only been burthened with her ordinary expenses and the expenses caused by the damage. But for the expenses incurred by default of her owner or master she would probably have sailed for Calcutta months before." On these considerations the Court held that the notice of abandonment given after her arrival at Calcutta and the ascertainment there of her injuries, came too late (*g*).

Underwriters cannot withdraw acceptance of

1199. The law of England agrees with that of France and the United States in holding that if a notice of abandonment

(*g*) Accord. per Blackburn, J., as to this case in Rankin *v.* Potter (1873), L. R. 6 H. L. 117, 119, 123.

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is once accepted by the underwriters, it is irrevocable unless made under a mistake of fact.

Thus, in the case of Smith *v.* Robertson, as it appeared that the underwriters had accepted a notice of abandonment, the subsequent restoration of the ship before action brought was held not to defeat the right of the assured to recover for a total loss in respect of such notice. The facts were these:—The broker gave notice of abandonment to the underwriters (accompanied by the master's protest) on the 19th of October, the day after receiving intelligence of the ship's capture; the underwriters, on the 24th, returned the protest to the broker, with a notification "that they were satisfied." On the same evening advice was received of the ship's recapture, and shortly afterwards she was brought into port, where she discharged her cargo and earned freight. Lord Eldon held that the underwriters were bound by their acceptance, and "could not be allowed to say that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss" (*h*).

What amounts to an acceptance.

As, therefore, an acceptance by the underwriters has these important effects, it is desirable to ascertain what acts on their part will constitute an acceptance. In England there is no established form in which it must be conveyed; any verbal or written assent, from which it may be distinctly inferred that the underwriters intended to adopt the abandonment, is a sufficient acceptance.

1200. The question whether an abandonment has been accepted is primarily a question of fact. But the circumstances of the case may be such that a jury may be properly told, as a matter of law, that if they think the underwriters have done certain acts which are consistent only with their having accepted the abandonment, then they ought to find

(*h*) Smith *v.* Robertson (1814), 2 Dow, 474; see also Hudson *v.* Harrison (1821), 3 Brod. & Bing. 153. The effect of an acceptance is well expressed by Boulay-Paty:—"Par leur acceptation volontaire il s'est fait un pacte entre les parties qui a tout terminé." 4 Boulay-Paty, Droit Com. 380.

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that the abandonment has been accepted. And further, although they may not really have accepted the abandonment, they may have so acted that a judge may very properly tell a jury that, having acted in a certain way, and having thereby altered the rights, the condition, and the interests of the owner, although they have not accepted the abandonment, and the jury ought to find accordingly in point of fact, yet in point of law they ought to be dealt with as if they had accepted it (*i*).

Acquiescence in the abandonment must distinctly appear.

The evidence ought distinctly to show their acquiescence. Thus where, on being informed of the loss, they merely requested that the assured would do the best they could with the damaged property, this was held not to amount to an acceptance (*k*).

Mere silence does not amount to acceptance.

The mere silence of the underwriters on receiving notice of abandonment does not in itself amount to an acceptance; for, as Story, J., remarks, "they are not bound to signify their acceptance. If they say and do nothing, the proper conclusion is that they do not mean to accept" (*l*).

May be inferred from acts without word or writing.

It is not, however, necessary that the underwriter should express his assent to the abandonment either in word or writing; his acceptance may be inferred from his acts, or, as has been suggested above, he may be estopped from denying acceptance, when his acts are such as naturally to lead the assured to infer that the abandonment is acquiesced in, and to act accordingly.

Therefore, where the insurers, upon notice of abandonment received by them, took possession of the wrecked vessel, brought her away, did repairs upon her, and kept her in their possession for some time until she was sold under a claim of salvage, this was held to be clear evidence of acceptance of the abandonment, whereby they had waived a breach

(*i*) Per Lord Penzance in Shepherd *v.* Henderson (1881), 7 App. Cas. at p. 64.

(*k*) Thellusson *v.* Fletcher (1793), 1 Esp. N. P. 72.

(*l*) In Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, 27, cited 2 Phillips, Ins. s. 1691.

Sect. 1200. of warranty and made themselves liable for the loss (*m*). In short, whenever the underwriters, after receiving notice of abandonment, do any act in consequence thereof which could be justified only under a right derived from it, and without giving any notice of their object, such act has been held in the United States, and it seems would be held in this country, to be itself decisive evidence of an acceptance (*n*), or at least of an estoppel to the same effect.

Time for accepting.

1201. Consequently, it is not to be expected that there should be any fixed rule in England as to the time within which an acceptance should be made. Lord Eldon, indeed, in Smith *v.* Robertson, seemed to consider that, as the assured was bound to make his election at once to abandon, there might be "a corresponding obligation" on the part of the underwriter "to accede to the abandonment *de præsenti*" (*o*), "evidently showing," says Park, J., "that he thought the underwriter should say at the earliest opportunity whether he will accept the abandonment or not" (*p*).

Accordingly, by the Court of which Park, J., was a member, the silence of the insurers for two months after receipt of notice of abandonment was held to amount to acquiescence in it (*q*).

But in practice no such obligation is recognized between assured and insurer, as being upon the latter in respect of notice of abandonment. And recently the Privy Council have recognized the opinion of Story, J., which has been cited above (*r*), as being the rule of law in this country—that

(*m*) Provincial Ins. Co. of Canada *v.* Leduc (1874), L. R. 6 P. C. 224. See per Lord Penzance, Shepherd *v.* Henderson (1881), 7 App. Cas. 49, 64.

(*n*) Per Story, J., in Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, 27; Cincinnati Ins. Co. *v.* Bakewell (1844), 4 B. Munroe, R. (Ken.) 541; and see cases cited in 2 Phillips, Ins. s. 1698; Provincial Ins. Co. of Canada *v.* Leduc, *supra*. *Secus*, where the conduct of the underwriters could be otherwise justified, *cf.* Shepherd *v.* Henderson, *supra*.

(*o*) In Smith *v.* Robertson (1814), 2 Dow, 479.

(*p*) Per Park, J., in Hudson *v.* Harrison (1821), 3 Brod. & Bing. 108.

(*q*) Hudson *v.* Harrison, *supra*.

(*r*) *Ante*, s. 1200.

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the insurers are not bound to signify their acceptance, and that if they say and do nothing the proper conclusion is that they do not mean to accept (*s*).

Revocation of acceptance of abandonment, or waiver of rights thereunder.

1202. It appears, therefore, that acceptance of a notice of abandonment is irrevocable, except indeed by the mutual consent of the parties, and cannot be defeated by any subsequent acts whatever; if not accepted, the notice is defeasible either by the subsequent restoration of the property (*t*), or by acts on the part of the assured clearly showing that he himself has waived his right to insist on it, by treating the loss as partial and not total.

When waiver of notice will be inferred.

It must, however, be carefully borne in mind that no acts done by the master, while acting as agent of both parties and for the benefit of all concerned, in attempting to recover or repair the damaged property after notice of abandonment has been given, can operate as such waiver. But if the master appears to have been acting, not as the agent of both parties and for the benefit of all concerned, but under the directions or for the benefit of the assured exclusively (*u*)—or if the acts and interference of the assured with the use and management of the subject insured be such as manifestly to show that he intended to act for his own interest as owner, and not for the benefit of the underwriters—there appears little doubt that such acts and interference would operate as a waiver of his notice of abandonment (*x*).

1203. No dealings, however, of the master or of the assured with the abandoned property will have this effect, unless they unequivocally and unmistakably amount to acts of ownership. Thus where, on receiving intelligence that their ship and cargo had been carried by a mutinous crew into Barbadoes, and that

(*s*) Provincial Ins. Co. of Canada *v.* Leduc (1874), L. R. 6 P. C. 224, 237.

(*t*) Cologan *v.* London Ass. Co. (1816), 5 M. & S. 447. Such restoration must be before action brought. Ruys *v.* Royal Exchange Co., [1897] 2 Q. B. 135.

(*u*) Cf. Fleming *v.* Smith (1848), 1 H. L. Cas. 513.

(*x*) So decided in the United States in Columbian Ins. Co. *v.* Ashby and Stribling (1830), 4 Peters, S. C. R. 139; see 2 Phillips, s. 1732.

Sect. [illegible] the government agent there had sold the cargo, but not the ship; the assured in this country immediately gave notice of abandonment, and then wrote to the agent at Barbadoes, directing him to sell the ship also, and remit the proceeds of the sale both of ship and cargo to England, "as otherwise they (the assured) would not settle with the underwriters;" this was held by Lord Eldon and the House of Lords not to be a waiver of the previous notice of abandonment (y).

So where a ship was brought into her home port in a disabled state and being on survey found irreparable except at a cost which would have exceeded her repaired value, was sold by the assured after notice of abandonment, without the concurrence of the underwriters—this seems to have been admitted not to be a waiver of the abandonment (z).

So in the United States, where the assured, after the underwriters had refused to accept a notice of abandonment made on good grounds, sold the ship under circumstances that justified the sale, not for his own benefit but for that of all concerned, this was held not to amount to a waiver of his notice (a). Where, on the contrary, he sold her for his own benefit, this was considered as a clear case of waiver (b); so where he bought her in at the sale and then despatched her on another voyage (c). In one American case, Story, J., laid it down that if the assured, after notice of abandonment, were to proceed to repair the ship without consulting the underwriters, that would be a waiver of the notice; for the reasonable inference would be that the assured in such case was repairing her for his own benefit (d). The same point was decided in the Supreme Court of Error in New York, where a master, acting as agent for the owners, repaired at

(y) Brown v. Smith (1813), 1 Dow, Parl. Cas. 349.

(z) Allen v. Sugrue (1828), Dans. & Ll. 1[illegible], n. (a); and see Stewart v. Greenock Mar. Ins. Co. (1848), 2 H. L. Cas. 159.

(a) Walden v. Phœnix Ins. Co. (1810), 5 Johnson, 310.

(b) Abbott v. Sebor (1802), 3 Johnson, N. Y. Cas. 45; see 2 Phillips, Ins. s. 1699.

(c) Ogden v. Fire Ins. Co. (1813), 10 Johns. 177; and in error 12 ibid. 25; 2 Phillips, s. 1699.

(d) See Peele v. Merchants' Ins. Co. (1822), 3 Mason, 27.

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the Isle of France a ship, which had been abandoned by the assured at New York on first hearing of the casualty (*e*).

May the underwriter repair and restore so as to defeat abandonment?

1204. The insurers may, in the opinion of Valin, repair the ship notwithstanding notice of abandonment, and compel the assured to receive her back, provided they have not voluntarily settled as for a total loss and have acted, in repairing the ship, under protest against the validity of the abandonment (*f*). Emerigon denies this position (*g*), and the Code de Commerce sanctions his doctrine (*h*).

According to Phillips it appears that the prevailing doctrine in the United States is against any such right of the insurer (*i*), but that in this respect Massachusetts is an exception to the other States (*k*). It is to be noted that both in France and the United States an abandonment validly made is indefeasible by subsequent events (*l*). In this country an abandonment is not indefeasible until action brought. Till that event, therefore, the loss, though at one time total, is liable to be reduced to a partial loss by the restitution of the property insured under any such circumstances in this country that the assured may, if he please, have possession, and may reasonably be expected to take it (*m*).

Effect of abandonment as vesting in the underwriters the

1205. The effect of a valid abandonment is to transfer the whole interest in all that remains of the thing insured, as far as it is covered by the policy, together with all the rights and

(*e*) Dickey *v.* American Ins. Co., 3 Wend. 658, cited 2 Phillips, Ins. s. 1701. The learned author adds: "By repairing, the loss ceases to be a total one; making an abandonment and proceeding at the same time to repair involves an inconsistency, since by the abandonment the assured declares the ship to belong to the underwriter, and by repairing any further than merely to preserve the ship from destruction he makes it his own."

(*f*) 2 Valin, Com. liv. iii. tit. vi. des Assurances, art. 60, p. 144.

(*g*) Emerigon, c. xvii. s. 6, p. 231.

(*h*) Art. 385.

(*i*) 2 Phillips, Ins. s. 1706.

(*k*) *Ibid.* s. 1558.

(*l*) Code de Com. 385; 2 Phillips, Ins. s. 1705.

(*m*) Per Bayley, J., Holdsworth *v.* Wise (1828), 7 B. & Cr. 794; per Lord Campbell, Dean *v.* Hornby (1854), 3 E. & B. 180; and cf. Ruys *v.* Royal Exchange Ass. Corp., [1897] 2 Q. B. 135. See, however, Sailing Ship Blairmore Co. *v.* Macredie, [1898] A. C. 593.

Sect. 1205. liabilities arising out of its ownership, from the assured to the underwriters, in proportion to the amount of their several subscriptions (*n*).

ownership of the salvage.

Retrospective operation.

Such transfer is retrospective, operating from the moment of the casualty that gave the right to abandon, from which time the underwriters, by virtue of the notice of abandonment, are subrogated into the place of the assured, as complete owners of the abandoned property so far as it is covered by the insurance (*o*).

"Salvage losses."

The thing insured when thus transferred by abandonment to the underwriter is called the salvage; and the losses, which give the right of abandonment, salvage losses, or total losses with benefit of salvage. The effect of abandonment is not only to transfer to the underwriter the remains of the abandoned property, but also to clothe him from the moment of the loss with all the rights and all the responsibility of ownership, entitling him to prosecute all claims which belonged to the assured as owner of the thing insured, and rendering him

(*n*) Le délaissement équipolle à un transport. Le Guidon, cap. vii. Etre translatif de propriété est de l'essence du délaissement. 2 Valin, liv. iii. tit. vi. des Assurances, art. 60, p. 418; 2 Emerigon, c. xvii. s. 6, p. 230, ed. 1827; 4 Boulay-Paty, Droit Mar. 375. L'assureur est subrogé à tous les droits de l'assuré, car, en acquérant la chose, il acquiert aussi tous les accessoires. 3 Pardessus, Droit Com. 426. As far as abandonment of ship in this country is concerned, the generality of this doctrine must be regarded as controlled by the operation of the Merchant Shipping Acts: per Lord Truro, 1 Macq. H. L. Cas. 342.

The present editors, finding that the statement of the law as given above, together with this note, has the authority of Arnould as well as that of subsequent editions of this work, have thought it best to reproduce it unaltered from the 2nd ed. p. 1178. It is submitted, however, that this passage, as well as similar statements occurring a little lower down, to the effect that "abandonment transfers the remains of the abandoned property" and "clothes the underwriter with all the rights and responsibilities of ownership," must be received with caution. It may well be that abandonment *per se* merely divests the owner of his property, without necessarily vesting it in the underwriters, if they are unwilling to accept it. This point is dealt with somewhat more fully in s. 1213, *infra*. See 2 Phillips, s. 1726.

(*o*) Stewart *v.* Greenock Mar. Ins. Co. (1848), 2 H. L. Cas. 159; Sea Ins. Co. *v.* Hadden (1884), 13 Q. B. D. at p. 711; The Red Sea, [1896] P. at p. 24, per Lord Esher, M. R.

liable for all just demands that might have been made against the assured in the same capacity. Sect. 1205.

Right of underwriters on ship to freight earned by completion of voyage after abandonment.

1206. Upon this principle it was decided by Lord Ellenborough and the Court of King's Bench (*p*), and has ever since been the undoubted law in this country, that if, after abandonment of ship during a voyage, the ship nevertheless succeed in completing her voyage, so as to earn freight (*q*), such freight belongs wholly to the underwriter on ship, and to no extent either to the shipowner, or to the underwriter on freight. This principle was confirmed by the House of Lords in the case of Stewart *v.* Greenock Marine Insurance Company (*r*), and was recently enunciated very clearly by Lord Esher, M. R., in the Court of Appeal as follows:—"Now, what is the effect of that" (*i.e.* abandonment) "as between the underwriters and the shipowners, according to the case of Case *v.* Davidson and all the others? It seems to me that Lord Ellenborough pointed out distinctly in that case first of all that the ship is to be considered as having passed to the underwriters after the abandonment has been accepted, as from the time when the damage occurred to her which entitled the shipowners to abandon her (*s*). From that time the underwriter is entitled to everything which that ship, then being his, can earn; that is to say, that he can earn by her as being her owner. That is what he is entitled to, and that is what Lord Ellenborough has said. He is not entitled to anything that has been earned by the use of that ship before she was his ship. Now take the simple case of a ship, before the loss or damage, having been chartered or filled with cargo on bills of lading, the freight to be payable on the arrival of the ship and delivery of the goods. In such a case, at the time of the

(*p*) Case *v.* Davidson (1816), 5 M. & S. 79.

(*q*) This principle of course does not apply to a case where the freight is earned not by the original but by a substituted ship. Hickie *v.* Rodocanachi (1859), 28 L. J. Ex. 273.

(*r*) (1848), 2 H. L. Cas. 159.

(*s*) These last words are not to be found in Lord Ellenborough's judgment, though the position which they involve may perhaps be implied from the tenor thereof.

Sect. 1207 [illegible] the ship has earned nothing. He who was her owner up to the time of the loss has earned nothing by the use of the ship. But he who is owner when the arrives is entitled as owner to receive the freight; that is to say, he is entitled as owner by the delivery of the cargo at the port of destination to the freight for the use of the ship during the whole voyage. He obtains that freight by the use of the ship, and he obtains it in virtue of what the ship does when she arrives at her destination, and when she is his ship. That is the whole of the law of abandonment" (*t*).

Limitation of rights passing by abandonment.

1207. In the passage that follows it is made clear, however, that these principles apply only to freight which the shipowner would have been entitled to receive, if the ship had *completed* the voyage without being abandoned. The abandonees therefore have no right to receive freight paid or partially paid in advance by a charterer, because this is earned by the shipowner whether the voyage be subsequently completed or not (*u*). So, too, where the ship is under charter-party and the charterer is entitled by virtue of bills of lading to receive from consignees a larger sum than the charter-party freight payable by him to the shipowner, the abandonees receive only the charter-party freight, for the difference between that and the amount due by the bills of lading belongs to the charterers (*x*). And from the charter-party freight receivable by the abandonees, there must, moreover, be deducted the freight's proportion of general average and particular charges, but not expenses incurred on the voyage prior to the abandonment, where those expenses were not incurred in respect of freight alone (*y*).

Advance freight does not pass.

Now bill of lading freight in excess of that due under charter-party.

Nor any freight not being earned

1208. It is also to be observed that the freight which passes to the abandonees of ship is only freight which is being

(*t*) The Red Sea, [1896] P. 20. See also Stewart *v.* Greenock Mar. Ins. Co. (1848), 2 H. L. Cas. 159.

(*u*) But they are entitled to *pro rata* freight actually earned and received by the ship. London Ass. Corp. *v.* Williams (1892), 9 Times L. R. 96, 257 (C. A.).

(*x*) The Red Sea, at pp. 25, 26.

(*y*) The Red Sea, [1895] P. 293, per Bruce, J.

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earned at or after the time when the loss occasioning the abandonment occurs. For instance, the cargo on board may belong to the shipowner, in which case the abandonee can only recover in respect of the actual use of the ship subsequent to the time of loss (*z*).

at the time of the casualty.

And so, where a ship was under charter to load a cargo at a subsequent port, which she was disabled by collision from reaching, and her owners recovered damages from the ship in fault in respect not only of the loss of their ship itself, but also in respect of the loss of the freight which they expected to earn on the subsequent voyage, it was held that the damages awarded under the latter head were receivable by the shipowner, or by the underwriters on freight, and not by the abandonees of ship (*a*). For the loss of the ship itself the abandonees of ship can sue in the name of the shipowner (*b*).

Nor damages for loss of freight recovered from tort feasor.

1209. Similarly, it was decided that where underwriters had paid a total loss on British ships captured by the Spaniards, they were entitled, as salvage, to the proceeds of Spanish ships captured by way of reprisals, which had been distributed by the British Government amongst the assured (*c*): so the underwriters on freight are entitled, after abandonment, to the benefit of other freight earned, instead of that insured (*d*).

Other rights incidental to the ownership of the property pass as salvage to underwriters.

In one case a ship, valued in the policy at 6,000*l.*, and insured for the same amount, was totally lost by collision; the owners who had been paid the full amount of the insurance recovered against the ship in fault damages pro-

(*z*) Miller *v.* Woodfall (1857), 8 E. & B. 493.

(*a*) Sea Ins. Co. *v.* Hadden (1884), 13 Q. B. D. 706 (C. A.)

(*b*) Yates *v.* White (1838), 4 Bing. N. C. 272; 2 Phillips, s. 1711.

(*c*) Randall *v.* Cochrane (1748), 1 Ves. 98; Blaauwpot *v.* Da Costa (1758), 1 Eden, 130. But these cases were explained and distinguished in Burnand *v.* Rodocanachi (1882), 7 App. Cas. 333, and are discussed in the chapter on subrogation.

(*d*) Green *v.* Royal Exch. Co. (1815), 1 Marshall, 447; 6 Taunt. 68; Everth *v.* Smith (1814), 2 M. & S. 278; Brockelbank *v.* Sugrue (1831), 1 Mood. & Rob. 102. Cf. Hickie *v.* Rodocanachi (1859), 28 L. J. Ex. 273.

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portioned to a ship of the value of 5,000*l.*, the real value of the lost ship to her owners: but in consequence of the valuation in the policy it was held that the insurers were entitled to the whole amount of the damages (*e*). That decision has since been doubted in the House of Lords (*f*). A ship was damaged by collision with another ship, both ships being the property of the same owner, and the insurers, after paying under the policy, sued the owner and failed, because the assured owner could not have a right of action against himself, and the insurers could sue in no other right (*g*).

Underwriters can only sue in the name of their assured, and with his rights.

In the United States, where the assured, before abandonment, had a right to claim a general average contribution, such claim was held to have been transferred by the abandonment to the underwriters (*h*).

Underwriters right to salvage may be lost by setting for less than a total loss.

1210. Of course the underwriter, by not accepting the abandonment, or by other acts of the like kind, may lose all title to the ultimate benefit of salvage. A British ship and cargo were captured by the Brazilian Government, and condemned as prize for breach of blockade. The underwriters who had insured the cargo would not accept an abandonment, but compromised the claim for 35 per cent. Some time afterwards restitution and compensation were made by the Brazilian Government, and in an action by the insurers to obtain the benefit of this, the Court held that they were not entitled to anything (*i*).

Liabilities of ownership thrown upon underwriter by abandonment.

1211. As the abandonment thus vests in the underwriter all the privileges, so it throws upon him all the liabilities of ownership (*k*); for instance, the liability to pay salvage reward to third parties for saving the property and restoring

(*e*) North of England Iron S.S. Ins. Co. *v.* Armstrong (1870), L. R. 5 Q. B. 244; see *infra*, ss. 1228—1230.

(*f*) Per Lord Blackburn, Burnand *v.* Rodocanachi (1882), 7 App. Cas. 333, 342.

(*g*) Simpson *v.* Thomson (1877), 3 App. Cas. 279.

(*h*) Walker *v.* United States Ins. Co. (1824), 11 Serg. & Rawle, 61; 2 Phillips, s. 1709.

(*i*) Brooks *v.* M'Donnell (1835), 1 Y. & C. 500.

(*k*) But cf. *ante*, s. 1205; n. (*n*); *infra*, s. 1213.

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it to the underwriters; all liens to which the property is subject, such as for seamen's wages, and all other expenses of earning the pending freight (*l*): but as between the assured and the underwriter, the latter cannot be called upon to discharge incumbrances or liens with which the property was burdened before the casualty took place, and not arising out of the peril insured against (*m*).

Does abandonee of goods take subject to shipowner's claim for freight?

It is a question whether, upon an abandonment to the underwriter on goods, the abandonee takes the salvage subject to the shipowner's claim for freight; whether it be the full freight earned by their subsequent arrival in the original or a substituted ship, or the *pro ratâ* freight which becomes due on their acceptance by the merchant at the port of distress. In this country it was considered by Arnould to have been expressly decided (*n*), and as undoubtedly established as the general rule, that the assured cannot in such cases throw the loss on freight upon the underwriters on goods, and this on the plain principle that they have not, by the terms of their contract, engaged to indemnify him against it, and that the abandonment, although its effect is to subrogate the underwriters in the place of the assured, yet only does this to the extent of the insurance, which in a general policy on goods does not cover the freight. In the Supreme Court of the United States it was decided that a claim for freight against the abandonee could not be supported, and that, if the underwriters on goods had been obliged to pay freight in such case to the shipowner, in order to obtain possession of the salvage, they might either deduct the amount so paid from the loss, or, if a total loss had been previously settled, recover it from the assured as money paid to his use (*o*). Johnson, J., indeed, dissented from the opinion of the majority of the

Law in United States.

(*l*) Sharp *v.* Gladstone (1805), 7 East, 24; Barclay *v.* Stirling (1816), 5 M. & S. 6.

(*m*) So held in the United States in a case where the ship had been bottomried before she became the property of the assured. Williams *v.* Smith (1804), 2 Caines, 20, cited 2 Phillips, Ins. s. 1716; and cf. Sea Ins. Co. *v.* Hadden (1884), 13 Q. B. D. 706.

(*n*) Baillie *v.* Moudigliani (1785), 1 Park, Ins. 116. Arnould, 2nd ed. p. 1182.

(*o*) Columbian Ins. Co. *v.* Catlett (1827), 12 Wheaton, 383, cited 2 Phillips, Ins. s. 1718.

[illegible]

[illegible]

[illegible]

1212. [illegible]

[illegible] [illegible] The goods become his underwriters, by reimbursement they are consigned to him, and arrive at the port of destination to his, and the freight is not due upon the assured's goods, but upon the underwriter's, and he is the only party who derives the benefit of a higher market at the port of destination if the goods arrive there. Who then has so properly something to do with freight, to the effect of being liable for it?" These reasonings have undoubtedly great weight, and on principle it can hardly be doubted that Phillips is right.

[q], 1 Com. Cas. 262, 329; 2 Com. Cas. 249; [1897] App. Cas. 615. See also The Crystal, [1894] App. Cas. 508.

Sect. 1213. Does abandonment necessarily vest the property in underwriters?

consideration. Is it correct to say that the mere fact of abandonment necessarily vests the property in the underwriter, so as to throw upon him the liabilities of ownership even though he be unwilling to accept either the privileges or the liabilities attaching thereto? It is submitted that abandonment *per se* does not necessarily vest the property in anyone (*r*); all it does is to divest the owner of his property, and to give the underwriter an option either of accepting it or not, as he pleases. In the former event the property becomes the underwriter's property, and brings with it all the privileges and liabilities of ownership. But in the latter event the property becomes *res nullius;* no one therefore can be made liable *qua* owner of such property, though there might be claims in respect of the prior ownership thereof, if such prior owner had by his negligence put his property into such a position as to cause damage to others (*s*).

This question is discussed by Phillips (*t*), who points out that the statement that a valid abandonment invests the underwriters with all the rights, and subjects them to all the liabilities, of ownership, though in general true, yet must be taken with this qualification, that the assured cannot vest the underwriters with the ownership of the salvage, and subject them to all the subsequent liabilities of ownership, against their immediate disclaimer of such transfer. As an instance, he raises the question whether, supposing the freight to exceed the value of the salvage, the insurer of goods is bound to take to the salvage, and states his opinion that under such circumstances the underwriter might pay a total loss and decline taking to the salvage, provided he gave speedy notice of his intention so to do (*u*).

(*r*) Notwithstanding various *dicta* to the contrary; *e. g.*, by Lord Cottenham in Stewart *v.* Greenock Marine Ins. Co. (1848), 2 H. L. Cas. at p. 183.

(*s*) This point is mooted in the cases lastly referred to in our text, but no opinion is expressed.

(*t*) Vol. ii., sects. 1726, 1727.

(*u*) Arnould, however, seems to have thought otherwise. 2nd ed. pp. 1183—1184. The owner of cargo cannot excuse himself from payment of freight by abandoning the cargo to the shipowner. Dakin *v.* Oxley (1864), 33 L. J. C. P. 115.

[illegible] 214. 214. [illegible] the effects of an [illegible] in respect of [illegible] total loss [illegible] where no [illegible] a total loss has [illegible] the same rule applies, and the underwriter [illegible] paid a total loss [illegible] entitled to the benefit of any salvage that may ultimately come to hand or the proceeds of any sale of the property that may have been made by the assured or the master as his agent. Thus in the case of a missing ship, where there had been no formal abandonment, Gibbs, C.J., said that "the underwriters, on payment of a total loss, would of course be entitled to the ship if she afterwards turned up as salvage" (y). So, in the case of sea-damaged goods sold of necessity at an intermediate port, Lord Abinger said that "the net amount of the sale becomes money had and received to the use of the underwriter, upon the payment by him of the total loss" (z). And in a case where the underwriter had not paid, but was resisting payment, it was held that inasmuch as the sale was a "right sale," so as to constitute an actual total loss, the proceeds *ipso facto* vested in the underwriter without any notice of abandonment. In this case the proceeds were in the hands of the shipowner, who claimed a lien for *pro rata* freight; it was held that this was a matter which must be determined between the underwriters on the cargo and the shipowner, and could not affect the right of the cargo owners to recover for a total loss (a).

If, however, after adjustment and payment for a total loss, or after action brought, the whole of the thing insured be

(x) The payment, however, must have been accepted by the assured as in respect of a total loss. In The St. Johns (1900), 101 F. 469, a vessel had sustained such damage as entitled her owner to be paid the full amount of the insurance as particular average. It was held by Brown, D. J., that the insurers could not insist upon the assured abandoning.

(y) Houstman v. Thornton (1816), Holt, N. Pr. 242.

(z) Roux v. Salvador (1836), 3 Bing. N. C. 288; see also Randal v. Cockran (1748), 1 Ves. 98; and per Blackburn, J., in Rankin v. Potter (1873), L. R. 6 H. L. 130; Burnand v. Rodocanachi (1882), 7 App. Cas. 333.

(a) Saunders v. Baring (1876), 34 L. T. 419; 3 Asp. M. L. C. 133.

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recovered (as where a box of bullion was fished up and restored after its full insured value had been paid), the underwriter will not, on that account, be entitled to reclaim from the assured the whole amount of his subscription, but merely the thing saved, or its value after deducting the expenses of saving it (*b*).

Distribution of the salvage amongst the underwriters.

1215. Upon abandonment each of the underwriters participates in the benefits of the transfer, by sharing in the proceeds of the salvage, according to the proportion which the amount of his subscription bears to the whole value of the thing insured; and this without regard to the date of the different subscriptions, or the priority of the policies, if more than one.

In cases of double or over-insurance.

In France, if there be more than one policy, and the sum insured in the first policy itself amounts to the value of the thing insured, an abandonment to the underwriters on the first policy carries the whole property in the thing insured, and there will be nothing to abandon to the underwriters on the subsequent policies; in such case, accordingly, the policy first effected is alone considered binding, and the underwriters on the rest are discharged from all claim; and are, of course, entitled to no share in the salvage (*c*).

In our own country a different rule prevails, and the assured in such case may sue both sets of underwriters, but can only recover up to the amount of his loss, to which all the underwriters on both policies shall contribute according to the amount of their several subscriptions, and are, of course, entitled to a proportionate share of the proceeds of the salvage (*d*).

(*b*) Da Costa *v.* Firth (1766), 4 Burr. 1966; Ruys *v.* Royal Exch. Ass. Co., [1897] 2 Q. B. 135. Arnould (2nd ed. p. 1185) followed here with a paragraph in which, citing Tunno *v.* Edwards (1810), 12 East, 488, and Goldsmid *v.* Gillies (1813), 4 Taunt. 803, he stated the same principle to apply in cases where the underwriter had settled with the assured for less than a total loss. The cases cited do not seem to be in point, and the practice is not in accordance with Arnould's statement.

(*c*) Code de Com. art. 359.

(*d*) Newby *v.* Reid (1763), 1 W. Bl. 416; 1 Marshall, Ins. 139—145. The law is the same in the United States (3

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[illegible]

Mode of apportioning the salvage among persons interested in different interests.

1216. If there be three insurances, one on the ship and cargo, one on the ship only, and one on the cargo only, a question has been raised as to the mode in which the salvage should be shared amongst the different sets of underwriters. *Emerigon* adopts a mode of adjustment whereby the underwriters on ship and cargo, though they may have insured only the same amount that has been subscribed for by the underwriters on the two separate interests respectively, shall yet be entitled to a double share of the effects abandoned: *Marshall* recommended the following more equitable method, by which all would take an equal share in the salvage. Take the following data: let a ship, valued at 5,000*l.*, and a cargo at 5,000*l.* (making a total of 10,000*l.*) be insured by three policies, thus:—

	£
On ship and cargo - - - - -	3,000
On the ship only - - - - -	3,000
On the cargo only - - - - -	3,000
Uninsured - - - - - -	1,000
	£10,000

Kent, Com. 280), but may be altered by express clauses in the policy.

(*e*) 2 Emerigon, c. xvii. s. 14, pp. 273—275.

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A shipwreck happens, and the net proceeds of the wreck of the ship are 500*l.*, and of the sea-damaged cargo 500*l.*, total 1,000*l.* The adjustment should be as follows:—

	£
To the owners, for their part of ship and cargo uninsured	100
To the insurers on ship and cargo, a moiety of three-fifths of the produce of the wreck	150
And a moiety of three-fifths of the produce of the cargo	150
To the insurers on ship, three-fifths of the produce of the wreck	300
To the insurers on goods, three-fifths of the produce of the cargo	300
	£1,000

As between insurers and bottomry bondholders.

1217. The Ordonnance de la Marine decreed that where money had been lent on bottomry, and also insured on the same subject, the lender on bottomry, in case of abandonment, should be paid the full amount out of the proceeds of the salvage, to the entire exclusion of the underwriters, supposing the salvage not sufficient for both (*f*). Emerigon (*g*) and Pothier (*h*) rested this law on the principle, that the underwriter, by virtue of the abandonment, was put exactly in the place of the assured, and therefore could not dispute the claim of the bottomry lender, who had become his creditor by the effect of this entire subrogation. Valin (*i*) opposed this view on the ground that abandonment is not an absolute substitution of the underwriter for the assured, but only to the extent of the insurance; that, consequently, the underwriter becomes upon abandonment a debtor to the bottomry lender only in the proportion which the sum insured bears to the whole of the subject; and that, on principle, the bottomry

(*f*) Tit. Contrats à la Grosse, art. 18.

(*g*) Chap. xiii. s. 12, vol. ii. p. 269.

(*h*) Traité des Contrats à la Grosse, No. 49.

(*i*) Comment. on Ord. tit. à la Grosse, art. 18, vol. ii. p. 20.

Sect. 1217. lender and underwriter ought both to share in the benefit of the abandonment, in proportion to their respective interests.

These reasonings of Valin were adopted in the French Legislative Council (*k*); and the 331st Article of the Code de Commerce accordingly provides that, upon abandonment, the proceeds of the property saved shall be divided between the lender on bottomry for his principal solely, and the insurer, for the amount insured, rateably according to their respective interests.

Arnould advocated the adoption of the same rule in this country (*l*). But it has since his time been clearly established, both in this country by the Privy Council (*m*), and in America by the Supreme Court (*n*), that the bondholders' claim to the salvage prevails over that of the underwriters.

Duties of the master in case of abandonment.

1218. By the general law maritime, as recognized alike in this country and foreign states, the assured is bound, on the occurrence of any casualty which authorises an abandonment, to do his utmost to avert a total loss, so as to lighten, as far as possible, the burden which is to fall on the underwriters. In so doing he is considered to be the agent of the underwriters, and the exertions he makes in such capacity do not at all prejudice his right to insist on his abandonment.

This generally-recognized right is expressly conferred on the assured in our English policies by a special clause to the following effect:—"And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travail for, in, or about the defence, safeguard, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to the insurance, &c." (*o*).

(*k*) See 3 Boulay-Paty, Droit Mar. 227—232.

(*l*) 2nd ed. p. 1188. See also 2 Marsh, Ins. 768, 769; Benecke, Pr. of Indem. 74—83.

(*m*) Stephens *v.* Broomfield (1869), L. R. 2 P. C. 516.

(*n*) Ins. Co. *v.* Gossler (1877), 96 U. S. 645.

(*o*) See the effect of these words noticed in Stringer *v.* English Mar. Ins. Co. (1869), L. R. 4 Q. B. at p. 686.

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Duty of master under suing and labouring clause.

Although the language is "it shall be lawful," the law and practice of this, and almost all other countries, imposes it upon him as his bounden duty. The Code de Commerce, in order to remove all ambiguity, has adopted the suggestion of Valin (*p*) and Emerigon (*q*), and expressly enacted that the assured is bound so to exert himself, "que l'assuré doit travailler," &c. (*r*).

As agent for those ultimately concerned.

Immediately, therefore, that the emergency arises, and before notice of abandonment has been given, the master is bound to take every necessary measure for the defence, safeguard, and recovery of the thing insured; in so doing he acts as the agent for both parties, or, more accurately speaking, as the agent of the party who may eventually turn out to be interested in the salvage, and, as such, derive benefit from his exertions (*s*).

If no abandonment be made, that party is, of course, the assured himself: it is as agent for the assured that the master will turn out to have acted, and it is to the assured himself he must look for making good all expenses *bonâ fide* incurred.

If, however, an abandonment be made which is either accepted or ultimately proves effectual, the underwriter becomes owner of the property from the moment of the casualty (*t*); and therefore the master, by operation of law, is his agent in so acting.

Repurchase of ship by master.

1219. On this principle, if a captured ship be repurchased by the master, in cases where no notice of abandonment is given, he is considered to have effected such repurchase as agent for the owners; and, if the transaction be legal, and the master have acted *bonâ fide* and within his authority under the circumstances, the assured will be bound by his acts,

(*p*) Com. vol. ii. p. 337.

(*q*) 2 Emerigon, 235.

(*r*) Code de Com. art. 381; see also 4 Boulay-Paty, Droit Mar. 308—310.

(*s*) 3 Kent, 331; Carver on Carriage, s. 294.

(*t*) See, however, s. 1213, where it has been suggested that the underwriter may disclaim such ownership.

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[illegible] Malaga [illegible] The Court [illegible] belonged to the underwriters. Kent, C. J., said: "The assured abandon and the underwriters accept and pay; they were then substituted for the assured, and succeeded to the benefit of the acts of the agents abroad: the merchants at Malaga acted, nominally, as agents for the assured, but in reality they were agents for the party having the ultimate claim to the property (y).

(u) M'Masters v. Schoolbred (1794), 1 Esp. 238; Wilson v. Forster (1815), 6 Taunt. 25; 1 Marshall, R. 425.

(x) So held by Chancellor Kent in Jumel v. Marine Ins. Co. (1811), 7 Johnson, 423, 424.

(y) United Ins. Co. v. Robinson in error, 1806, 1 Johnson, 591.

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The master is agent of the assured until abandonment. On abandonment he becomes the agent of the underwriters.

1220. Several cases, to a similar effect, have been decided in the United States, all tending to establish the position, that the master, although agent of the assured before the abandonment, becomes, by abandonment, supposing it to be effectual or accepted, the agent of the underwriters from the moment of the casualty: the ground of this doctrine being that as the interest in the salvage is thereby transferred to them from that time, the agency is transferred with the subject (*z*).

Underwriters may repudiate the acts of the master.

It has also been decided in the United States, that, though the underwriters, after abandonment, are entitled to affirm a repurchase, yet they are not bound by it, unless they elect to take it. "The insurer," says Chancellor Kent, "can accept of the repurchase by the master, as his constructive agent, and affirm the act, or he can leave it to fall upon the master" (*a*).

Of course, if the master after abandonment of ship busies himself about performance of the contract of charter-party, for instance, by taking up another vessel in order to carry on the cargo or passengers, he is at least not the agent of the underwriters on ship in so doing, for their right and relation as owners and principals arise out of the abandoned ship, and extend no further; they have therefore no claim on the freight earned by the substituted ship. The master in hiring this vessel most probably acted as the agent of his owners (*b*), but not necessarily (*c*).

Recovery of more than the amount of the insurance.

1221. It is quite clear that the assured can recover for a total loss, as such, only the amount of the insurance, or the agreed value in the policy: the only question is, whether he

(*z*) See these cases collected, 2 Phillips, Ins. s. 1731 *et seq.*, especially Columbian Ins. Co. *v.* Ashby, 4 Peters, S. C. R. 139.

(*a*) 3 Kent, 332. For this position the learned commentator cites the following authorities: — Saidler *v.* Church, (1799) 2 Caines, 286; Jumel *v.* Marine Ins. Co. (1811), 7 Johnson, 412; United Ins. Co. *v.* Robinson (1805), 2 Caines, 280; Willard *v.* Dorr (1823), 3 Mason, 161. These cases will be found collected and commented on 2 Phillips, s. 1731.

(*b*) Hickie *v.* Rodocanachi (1859), 28 L. J. Ex. 273; 4 H. & N. 455.

(*c*) See the discussion in Matthews *v.* Gibbs (1860), 30 L. J. Q. B. 55.

Sect. 1222. and recover in addition to this the amount of any average or partial loss sustained before the happening of the casualty, in respect of which the total loss is paid.

As to this, it seems to be now established: 1. That he cannot so recover when the previous partial loss consists merely of sea-damage: 2. That he may so recover when it consists of repairs actually made before the total loss incurred, and this either as expenses incurred by him under the special clause in labouring and travelling for the defence, safeguard, and recovery of the thing insured, or else as a substantive average loss, though the former seems unquestionably the more correct and preferable mode of stating the claim.

Prior average loss by sea-damage unrepaired merges in a subsequent total loss.

Livie v. Janson.

A ship "warranted free from American condemnation," in attempting to escape an American embargo, ran out of New York in the night, and sustained an average loss by stranding on the rocks of Governor's Island, where she was deserted by her crew, and next day was seized there by the Americans, and condemned by them for breach of the embargo: the assured claimed a total loss; but the Court held that he could recover nothing: not a total loss, for that was caused by American condemnation, a risk expressly excepted by the policy; not an average loss, because the total loss, by subsequent seizure and condemnation, took away the right to recover in respect of the previous partial loss by sea-damage (*d*).

Doctrine as stated by Lord Ellenborough.

1222. Upon the general question, Lord Ellenborough said, "There may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss. Actual disbursements for repairs in fact made, in consequence of injuries by perils of the seas prior to the happening of the total loss, are of this description, unless, indeed, they are more properly to be considered as covered by that authority, with which the assured is generally invested by the policy,

(*d*) Livie *v.* Janson (1810), 12 East, 648.

of 'suing, labouring, and travailing for, in, and about the defence, safeguard, and recovery of the property insured;' in which case, the amount of these disbursements might more properly be recovered as money paid for the underwriters under the direction and allowance of this provision of the policy, than as a substantive average loss to be added cumulatively to the total loss which is afterwards incurred in consequence of the sea risks" (*e*). Sect. 1222.

Actual disbursements for repairs made prior to the total loss, may be recovered in addition thereto. Le Cheminant *v.* Pearson.

In another case the previous partial loss was of the description alluded to by Lord Ellenborough, and consisted of actual disbursements for repairs in fact made prior to the total loss: in this case the ship while lying in port at Jersey, before sailing, sustained an average loss by sea-damage, which the plaintiff repaired; the ship having been afterwards totally lost by capture in the course of the voyage, the plaintiff brought his action for a total loss, and claimed also to recover in respect of the expenses incurred in the repairs of the previous partial loss, by virtue of the suing and labouring clause. The Court of Common Pleas held that the plaintiff might recover, in addition to a total loss, for the sums so expended; and Sir J. Mansfield remarked that he might so recover, either as for an average loss from damage repaired, or as expenses incurred under the permission in the policy, "to sue, labour, travail," &c. (*f*).

An unrepaired loss is a prejudice to a sale.

1223. If the assured, after sustaining an average loss, sell his vessel unrepaired, he is nevertheless entitled to recover for the partial loss, on the ground that the damage sustained is a continuing prejudice, for the ship's value must have been lessened by it. "Therefore, the amount of the loss must be calculated as though the ship had actually been repaired and proceeded on her voyage, or had foundered without being repaired, soon after the policy expired" (*g*).

(*e*) 12 East, 655.

(*f*) Le Cheminant *v.* Pearson (1812), 4 Taunt. 367. Cf. also Stewart *v.* Steele (1842), 11 L. J. (N. S.) C. P. 155; 5 Scott, N. R. 927; Blackett *v.* Royal Exch. Ass. Co. (1832), 2 Cr. & J. 244. And, in America, Matheson *v.* Equitable Mar. Ins. Co. (1875), 118 Mass. 209.

(*g*) Per Lord Campbell in Knight

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The *Diana* was insured in a valued policy for 3,000*l.* "lost or not lost" at and from Calcutta and for thirty days after arrival. The same vessel was insured in a valued policy for 3,000*l.* "lost or not lost" at and from Calcutta and for thirty days after arrival in England. On the outward passage, subsequently during the currency of the first policy, the ship met and sustained such damage that she was kept there only by continual pumping till her arrival at Calcutta. There she discharged her cargo, and was then placed in a dry dock for repairs. But if the repairs had been done and the first policy had expired when she sailed for and was totally destroyed, the second or homeward policy having attached as soon as she arrived at Calcutta. It was held under these circumstances, that the assured was entitled to recover under the first or outward policy the full amount of the partial loss, repaired or unrepaired, and under the second or homeward policy the full amount insured as for a total loss.

The second, being a valued policy, attached on the vessel with the agreed value, notwithstanding the unrepaired damage was then subsisting, as there was no fraud on either side; and consequently, when the total loss had occurred, the sum recoverable under this policy was the full agreed value (*i*). Had the fire taken place during the currency of the first policy only, the assured could not have recovered for the unrepaired damage.

v. Faith (1850), 15 Q. B. 649. As to the rule for calculating an unrepaired partial loss on a vessel sold under this condition, see Pitman *v.* Universal Mar. Ins. Co. (1882), 9 Q. B. D. 192; *ante*, s. 1034.

(*h*) Lidgett *v.* Secretan (1871), L. R. 6 C. P. 616.

(*i*) Lidgett *v.* Secretan, *supra*; *S. P.* Barker *v.* Janson (1868), L. R. 3 C. P. 303.

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Even where the particular average is so serious that it would have justified a claim for a constructive total loss.

It appears clear that however serious be the particular average, even, in fact, if it be so serious that it would have justified the owner in giving notice of abandonment, he will not thereby be precluded from recovering for a subsequent total loss. Thus, where the defendants insured the plaintiffs' vessel by a valued time policy for 20,000*l.* against fire, and the vessel stranded and was so severely injured that the cost of repairing her would have been greater than her value when repaired, and she was very shortly afterwards completely destroyed by fire, it was held that the plaintiffs were entitled to recover the full amount of the insurance, notwithstanding the fact that the vessel might prior to the fire have been treated by her owners as a constructive total loss (*k*).

Foreign law.

The principles thus established in our jurisprudence have been adopted and confirmed in that of the United States (*l*).

In France it has been decided, after considerable fluctuation of opinion among the authorities, that cost of repairs, rendered necessary by prior sea damage, may be recovered cumulatively (*m*).

Practice as to adjustment of total losses, actual and constructive.

1224. In cases of abandonment the assured, as we have seen, is entitled to the whole amount of the insurance, and the underwriter, on payment of such amount, is entitled to the net proceeds of whatever may be saved,—in other words, to the salvage, after deducting the expenses of saving and recovering it. We have also seen that, even where no notice of abandonment has been given, he is equally, on payment of a total loss, entitled to the net salvage that may ultimately come to hand (*n*). The only difference between the two cases is, that, in the former, the underwriters generally at once pay the whole amount insured, and the salvage is

(*k*) Woodside *v.* Globe Mar. Ins. Co., [1896] 1 Q. B. 105.

(*l*) See the cases collected in 2 Phillips, Ins. s. 1742.

(*m*) 4 Boulay-Paty, Droit Com. Mar. 519—532, gives the earlier jurisprudence; see also Nolte's edition of Benecke, vol. ii. pp. 191—193.

(*n*) In the former case the loss used frequently to be called a salvage loss with, and in the latter, a salvage loss without, abandonment.

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Loss on goods sold unrepaired at any port short of their destination in consequence of, what is called, a damage case.

[illegible] the rule of adjustment is generally settled. Only [illegible] of what is called a damage case: that is, where the cost of repair is less than the amount by which the value of the goods is increased when repaired—and that is where, by the perils of the sea, the ship is disabled and prevented from proceeding on her voyage at some place short of her port of destination, and the cargo or that part of it which is saved, in order to prevent further deterioration, is obliged to be sold at the place of the disaster: in such cases the loss is, in practice, almost always adjusted as a salvage loss, *i.e.*, each underwriter either at once pays the whole amount of his subscription, and takes his proportionate share of the net proceeds of the sale, after deducting all necessary expenses; or he pays the difference between such share and the amount by him subscribed (*p*). In one case, where a ship, with a cargo of indigo just loaded on board, was upset and sunk in her port of loading, and the indigoes, having been got out of her, were sold by auction there, at a loss of 71 per cent. on their cost price on board, the Court held, that the true principle of adjustment was to settle this as a total loss, with benefit of salvage, *i.e.*, to calculate the loss according to the difference between the invoice price of the indigo at its port of loading and the sum it fetched as sold there in its damaged state; and the

(*o*) For examples, see Gammon *v.* Beverley (1817), 1 Moore, 563; 8 Taunt. 119; Russell *v.* Dunskey, 6 Moore, 283.

(*p*) Stevens, Average, 79—81; Benecke, Pr. of Indem. 412—447.

loss having been adjusted by an arbitrator on this principle, the Court refused to set aside his award, although it appeared that the indigo, after the sale, had been dried and sent on by other ships to London (its port of destination), where it realized nearly as much as though it had received no injury whatever (*q*). Sect. 1224.

(*q*) Hardy *v.* Innes (1822), 6 Moore, 574.

CHAPTER IX.

SUBROGATION.

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Subrogation explained. Its relation to abandonment.

1225. Closely related to the doctrine of abandonment is that of subrogation. Abandonment, as we have seen, applies only to cases of total loss, and practically only to contracts of insurance. Subrogation is an equitable arrangement incident to all contracts of indemnity and to all payments on account thereof. "The general rule of law and it is obvious justice," said Lord Blackburn (*a*), "is that where there is a contract of indemnity it matters not whether it is a marine policy or a policy against fire on land, or any other contract of indemnity, and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." And the doctrine was stated in even more comprehensive terms in the following year by Brett, L. J., in the Court of Appeal (*b*): "As between the underwriter

(*a*) In Burnand *v.* Rodocanachi (1882), 7 App. Cas. at p. 339.

(*b*) In Castellain *v.* Preston (1883), 11 Q. B. D. at p. 388.

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and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished" (*c*).

Indemnity is the guiding principle.

1226. And similarly: "What," said Bowen, L. J. (*d*), "is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect: That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss, he must account for the diminution to the underwriters." In Simpson *v.* Thomson (*e*) it is said by Lord Cairns, L. C.: "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

The principle insisted upon both throughout the judgments in the cases cited, and elsewhere (*f*), is, that it is entirely foreign to the spirit of contracts of indemnity that a person damnified should recover his loss more than once over: it is, therefore, clear that if he has already recovered from a third party, there can be no liability under the contract of indemnity. And on the other hand, if he has not previously recovered from such third party, but has the right to do so,

(*c*) Per Brett, L. J. at p. 388.
(*d*) At p. 401.
(*e*) (1877), 3 App. Cas. at p. 284.
(*f*) See, for example, Darrell *v.* Tibbitts (1880), 5 Q. B. D. 560.

Sect. 1226. there is no reason why such third party should be allowed to escape that his liability has been satisfied by a payment made by a stranger to him, under a contract with which he has nothing to do. The third party remains liable to the person indemnified just as if there had been no contract of indemnity *g*. But the person indemnified can only take the sum recovered from the third party as trustee for the indemnifier, and similarly, if he has not himself received any sum to which he is entitled, he is bound to afford the latter all facilities for doing so. In practice, the commonest way in which the principle of subrogation is applied to insurance, is for the insurer to pay the claim of the assured, and then to institute proceedings in the name of the latter, but for his own benefit, against the party ultimately liable.

The distinction between principles of abandonment and of subrogation.

1227. The difference between the principle of abandonment and that of subrogation is that whereas the former has effect only in cases of total loss, the latter applies, as we have seen, to all contracts of indemnity and to all cases in which any loss is reimbursed by the party indemnifying, whether it be partial or total.

In cases of total loss, the insurer by abandonment becomes the owner of the thing that is lost; by subrogation he becomes entitled to the benefit of claims and other remedies which may be independent of the ownership of the thing itself. This distinction between abandonment and subrogation was pointed out by Lord Blackburn (*h*) in the following terms:—"Where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property (*hh*), are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid. The right to receive payment of freight accruing due, but not

(*g*) Randal *v.* Cockran (1748), 1 Ves. Sen. 97; Mason *v.* Sainsbury (1782), 3 Doug. 61; Yates *v.* White (1838), 4 Bing. N. C. 272.

(*h*) In Simpson *v.* Thomson (1877), 3 App. Cas. at p. 292. See also the very lucid judgment of Brown, D. J., in The St. Johns (1900), 101 F. 469 (New York District Court).

(*hh*) But none beyond: see Sea Ins. Co. *v.* Hadden, C. A. (1884) 13 Q. B. D. 706. *Ante*, s. 1178; *post*, s. 1232.

Sect. 1227.

earned, at the time of the disaster, is one of those rights so incident to the property in the ship, and it therefore passes to the underwriters because the ship has become their property, just as it would have passed to a mortgagee of the ship who before the freight was completely earned had taken possession of the ship. (See Keith *v.* Burrows (*i*)). . . . But the right of the assured to recover damages from a third person is not one of those rights which are incidental to the property in the ship; it does pass to the underwriters in case of payment for a total loss, but on a different principle. And on this same principle it does pass to the underwriters who have satisfied a claim for a partial loss, though no property in the ship passes. . . . Mason *v.* Sainsbury (*k*) and Yates *v.* White (*l*) were both cases of partial loss only. The right of the underwriters could not arise in those cases by relation back to the passing of the property at the time of the loss, for there was no such passing of the property. It could only arise, and did only arise, from the fact that the underwriters had paid an indemnity, and so were subrogated for the person whom they had indemnified in his personal rights from the time of the payment of the indemnity."

Can subrogation give underwriters more than an indemnity?

1228. Abandonment must always be of the whole thing insured: there is no such thing as abandonment of part (*m*). Even though the thing abandoned prove eventually to be of more value than the amount paid to the assured, yet the underwriter may undoubtedly retain possession of the whole proceeds. It is not, however, clear that the same is true of subrogation. Unless the contrary is established by the case of North of England Insurance Co. *v.* Armstrong (*n*), it is submitted that subrogation, apart from abandonment, can

(*i*) 2 App. Cas. 636.

(*k*) (1782), 3 Douglas, R. 61.

(*l*) (1838), 4 Bing. N. C. 272. Cf. also Tunno *v.* Edwards (1810), 12 East, at p. 492.

(*m*) A seeming exception to this rule is where the thing totally lost has only been partially insured. In such a case the owner is considered to be his own underwriter to the extent of the uninsured portion. Abandonment then vests the whole thing in the underwriters jointly with the assured.

(*n*) (1870), L. R. 5 Q. B. 244.

Sect. 1228. never entitle the insurer to enforce, for his own benefit, the claims of the assured, except in so far as it may be necessary to reimburse him for his payment under his contract of insurance. If he recovers more by the exercise of his right of subrogation than he has paid to the assured, it seems just that the surplus ought to be payable by him to the latter.

North of England Ins. Co. v. Armstrong.

The facts of the case above referred to were as follows: The "Hetton" was sunk and totally lost, owing to a collision with the "Uhlenhorst." The plaintiffs, who were underwriters on the "Hetton," paid the defendants, her owners, 6,000*l.* for a total loss, that being the policy valuation of the "Hetton." The plaintiffs then, using the defendant's name, brought an action against the "Uhlenhorst," which was held solely to blame for the collision. It appeared that the real value of the "Hetton" was 9,000*l.*, and this sum the owners of the "Uhlenhorst" would have been liable to pay, had they not succeeded in limiting their liability under the Merchant Shipping Act then in force; as it was, judgment was given against them for about 5,700*l.* The plaintiffs claimed that, by subrogation, they were entitled to the whole of this sum: the defendants contended that inasmuch as the real value of the "Hetton" was not 6,000*l.* but 9,000*l.*, they were entitled to participate in the 5,700*l.* The Court of Queen's Bench (*o*) decided that the sum belonged entirely to the underwriters.

1229. This decision is, no doubt, quite correct. The underwriters did not, in fact, recover from the "Uhlenhorst" a sum exceeding what they had paid under their contract of insurance. Nor was the sum so recovered to any degree enhanced by the fact that the "Hetton" was, in reality, worth more than she was valued at in the policy. It was the value not of the "Hetton," but of the "Uhlenhorst," on which the 5,700*l.* was based. And on the well-established principle that the policy valuation is binding in all questions as to the amount recoverable thereon from underwriters,

(*o*) Cockburn, C. J., Mellor and Lush, JJ.

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it is clear that if the "Uhlenhorst" had been first sued by the owners of the "Hetton," the latter could only have recovered 6,000*l.*, and would have been obliged to give credit for the 5,700*l.* obtained from the "Uhlenhorst." But the judgments in the case go further, and suggest that even if the whole 9,000*l.* had been recovered from the "Uhlenhorst," the underwriters on the "Hetton," on the ground of their having paid for a total loss, would have been entitled to retain the whole of this sum, although they would thus be making a profit of 3,000*l.* Thus Cockburn, C. J., says (*p*):— "I take it to be clearly established, in the case of a total loss, that whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and he does satisfy it. . . . I think it is clear also, where we have, instead of the ship, the supposed value of the ship, or so much of it as the delinquent vessel could be called upon to contribute for the loss, that what is recovered must be taken to represent the lost ship; and then, just as the underwriters would be entitled to the ship if it could have been bodily got back, so they are entitled to that which is the representative of the ship, in the shape of damages to be paid by the owners of the vessel which caused the collision." And similarly, too, Lush, J., says (*q*): "If the underwriters had got the wreck up, and if they had procured the wrongdoer to repair the vessel, the vessel so repaired would still belong to the underwriters. What difference can it make whether the wrongdoer repairs the thing in specie, or pays in money the amount it would take to repair?"

Error in North of England Ins. Co. *v.* Armstrong.

1230. It is submitted that in so far as these judgments imply that any rights pass to the underwriters beyond such as are necessary to reimburse them for the amount they have paid to the assured, they are contrary to the whole principle of the law of subrogation, the sole object of which is to

(*p*) At p. 248.

(*q*) At p. 251.

Sec. [illegible] [illegible]

[illegible] Lord Blackburn seven years later, between the principles and results of abandonment and subrogation. By the former, underwriters are entitled to the thing abandoned and to all rights of ownership accruing after they become owners. By the latter they become entitled to all the collateral remedies and advantages of the assured, but only for the purpose of reducing the loss which they have themselves sustained by payment under their policies.

Limitations of subrogation.

[illegible]. It is convenient at this point to consider some further instances in which the underwriter's rights of subrogation appear to have been limited in our jurisprudence.

Underwriter can only stand in the shoes of assured.

Firstly, it is clear that the underwriter is only entitled to the benefit of such remedies, rights, or other advantages, as the assured would himself be able to enjoy. The underwriter has no independent rights of his own and cannot even sue in his own name. It is true to say that the underwriter can only

(r) See per Brett, L. J., in Castellain v. Preston (1883), 11 Q. B. D. at p. 387. In The St. Johns (1900), 101 F. at p. 474, Brown, D. J., said: "If the amount recoverable from the wrongdoer after payment of the damage-claims of third parties were in excess of the amount paid by the underwriters to the assured, no doubt that excess would belong to the latter, since the insurer's right of subrogation in equity could not extend beyond recoupment or indemnity for the actual payments to the assured."

"stand in the shoes" of his assured, if we at the same time remember that he may be entitled to advantages in respect of which there may be no right of action against any third party (*s*). Thus, where two ships, A. and B., were the property of the same owner, and ship A. was sunk by the negligence of those in charge of ship B., it was held by the House of Lords that the underwriters on A., having paid for a total loss, had no claim upon a fund lodged in Court by the owner, to satisfy all claims for the damage caused by the negligent navigation of B. Inasmuch as the owner could not be answerable in damages to himself, no claim could be allowed against the fund in respect of any right derived from him and enforceable only in his name (*t*). The point was considered to have been in effect decided by a series of earlier cases (*u*). Sect. 1231.

1232. Secondly, where an insurer pays only a partial indemnity, his right of subrogation is correspondingly limited. He cannot be recompensed for payments which he has not made. Where a vessel is damaged by collision, and her owners recover from those by whose negligence the collision was caused damages in respect of matters which are not covered by a policy on ship, the underwriters cannot, by paying for a total loss, recover from their assured sums paid to them by the wrongdoer, but not paid as part of the value of the ship insured. The defendants' ship, "Queen of the East," was insured with the plaintiffs, and came into collision with the "Cassandra," for which collision the latter vessel was solely to blame. Subsequently the plaintiffs settled with the defendants on the basis of a constructive total loss. The defendants then received from the owners of the "Cassandra" a sum of money as compensation, not only for the loss of Rights of subrogation are commensurate with underwriter's liability.

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(*u*) Yates *v.* White (1838), 4 Bing. N. C. 272; Randal *v.* Cockran (1748), 1 Ves. Sen. 97; Mason *v.* Sainsbury (1782), 3 Doug. 61.

SECT. 1232. [illegible] vessel could not sue for the freight which was being earned by her—and would have eventually been earned by her but for the collision—under a counterclaim. The plaintiffs claimed the whole of this sum. The defendants contended that the portion of the damages representing freight had been properly paid over by them to their underwriters on freight, and was not payable to the plaintiffs. It was held by the Court of Appeal that the defendants' contention was correct. Lord M. R. said:—"In the present case what are the damages recovered? Some of them are damages recovered in respect of the value of the ship: that is a salvage in respect of the loss of the ship: that goes to the underwriters on ship. But what are the other damages? The others are a salvage in respect of the loss of freight. To whom ought that to go? To the underwriters on freight. Why? Because the freight and the ship are not so joined together that a salvage on the loss of freight is a salvage on the loss of the ship. . . . This recovery of damages in respect of the loss of freight—a separate recovery in respect of a separate and different loss from the loss of the ship—is not a salvage in respect of the loss of the ship; therefore it ought not to go to the underwriters on ship." The Master of the Rolls then proceeds to point out the distinction between the case put forward on the part of the plaintiffs and the case where, after abandonment, freight is earned. In the latter case the freight earned is payable to the underwriters because, at the time when it was earned, they were the owners of the ship.

Answer to difficulties suggested by Lowndes.

1233. The reasoning in this case seems to give the answer to a difficulty suggested by Lowndes (*y*). Where a vessel is partially damaged by a collision, an underwriter is in theory liable to indemnify the owner for the damage. In practice, however, owing mainly to the operation of the rule as to deduction of one-third new for old, the amount paid by the

(*x*) Sea Ins. Co. *v.* Hadden (1884), 13 Q. B. D. 706.
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underwriter is less than an indemnity. But if the assured, or the underwriter in his name, brings an action against the party responsible for the collision, it may well be that he recovers more in that action than the amount already paid under the policy. The rule as to thirds does not apply in an action against the tort-feasor; and other items, such as demurrage, are recoverable in such an action, which are not covered by the policy on hull. The practice in this case, as Lowndes admits, is to divide the amount recovered from the wrongdoer rateably between the owner and the insurers, in the proportion which the amount paid by the insurers bears to the amount paid by the wrongdoer. Thus the owner retains all damages awarded in respect of demurrage, and also the monies paid in respect of the thirds; the underwriter retains such portion of the damages as are attributable to the two-thirds which he has paid. Lowndes, however, suggests that, on principle, the underwriter ought to be allowed to retain the whole of the damages paid by the tort-feasor, apparently on the ground that the assured, having recovered what in law is deemed to be an indemnity from his insurer, cannot be allowed to hold against the latter anything beyond such indemnity. It is submitted, however, that both authority and principle are in favour of the practice above described. Sect. 1233.

1234. Thirdly, it has been stated that the advantages to which the insurer by subrogation succeeds are only advantages to which the assured is, or was, of right entitled. This was the ground of Brett, L. J.'s, decision, and was considered (*z*) by him to have been also the ground of the decision of the House of Lords, in Burnand *v.* Rodocanachi (*a*). The plaintiffs in that case were underwriters who had granted valued policies of insurance, including war risks, upon a cargo which was afterwards destroyed by the "Alabama," a Confederate cruiser. The underwriters paid the defendants as for an actual total loss, but the real value of the cargo

Can subrogation give insurer any advantages beyond those to which assured is as of right entitled? Burnand *v.* Rodocanachi.

(*z*) See Castellain *v.* Preston, *infra*. (*a*) (1882), 7 App. Cas. 333.

Opinion of Brett, L. J.

a) Randal v. Cockran (1748), 1 Ves. Sen. 98; Blaauwpot v. Da Costa (1762), 1 Eden, 130. See also Gracie v. New York Ins. Co. (1811), 8 John. N. Y. R. 237.

b) (1883), 11 Q. B. D. at p. 388.

must be limited to such advantages as the assured was of right entitled to, proceeds, "I think that the rule does require that limit. In Burnand *v.* Rodocanachi (*d*) the foundation of the judgment, to my mind, was that what was paid by the United States Government could not be considered as salvage, but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. I am aware that with regard to the case of reprisals, or that which a person whose vessel had been captured got from the English Government by way of reprisal, the sum received has been stated to be, and perhaps in one sense was, a gift of his own government to himself, but it was always deemed to be capable of being brought within the range of the law as to insurance, because the English Government invariably made the 'gift': so invariably, that as a matter of business it had come to be considered as a matter of right." Sect. 1234.

1235. It is doubtful, however, whether this opinion of Brett, L. J., can be sustained. The learned Judge's view as to the "foundation of the judgment" in Burnand *v.* Rodocanachi does not appear to be borne out by the judgments themselves. And his explanation of the reprisal cases is a different explanation from that given by the House of Lords. In those cases (*e*) British shipowners had sustained losses by Spanish depredations, and, general reprisals against Spanish property having been ordered by His Majesty's Privy Council, as a result of which a large sum of money came into the hands of the British Government, "the King was pleased (for I think it is clear that he was not bound) to say that half of that money should be applied to those who had suffered from the captures" (*f*). It was determined that the benefit of such payments enured to the persons who were bound to indemnify. The House of Lords justify these decisions, not Probably not sound.

(*d*) *Ubi supra.*

(*e*) Randal *v.* Cockran (1748), 1 Ves. Sen. 98; Blaauwpot *v.* Da Costa (1758), 1 Eden, 130.

(*f*) Per Lord Blackburn, 7 App. Cas. at p. 339.

Sect. 1230. prevent the assured from recovering more than a full indemnity (*r*). It is clear also that if the assured had sued the "Uhlenhorst" and recovered 9,000*l.* from her owners, without making any claim upon their underwriters, they would have been entitled to retain the whole of such sum. And it would also be strange if the underwriters should be allowed to make a profit, and the assured to sustain a loss, merely owing to the mistake of the latter in following, in a particular case, the usual business course of claiming upon their policy, instead of first proceeding against the party in default.

Confusion between abandonment and subrogation.

It is apprehended that the mistake in the judgments arose from the failure to grasp the distinction to which we have already referred, and which appears to have been for the first time expressly pointed out by Lord Blackburn seven years later, between the principles and results of abandonment and subrogation. By the former, underwriters are entitled to the thing abandoned, and to all rights of ownership accruing after they become owners; by the latter they become entitled to all the collateral remedies and advantages of the assured, but only for the purpose of reducing the loss which they have themselves sustained by payment under their contract.

Limitations of subrogation.

1231. It is convenient, at this point, to consider some further instances in which the underwriter's rights of subrogation appear to have been limited in our jurisprudence.

Underwriter can only stand in the shoes of assured.

Firstly, it is clear that the underwriter is only entitled to the benefit of such remedies, rights, or other advantages, as the assured would himself be able to enjoy. The underwriter has no independent rights of his own and cannot even sue in his own name. It is true to say that the underwriter can only

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Sect. 1232. their vessel itself, but also for the freight which was being earned by her—and would have eventually been earned by her but for the collision—under a charterparty. The plaintiffs claimed the whole of this sum. The defendants contended that the portion of the damages attributable to freight had been properly paid over by them to their underwriters on freight, and was not payable to the plaintiffs. It was held by the Court of Appeal (*x*) that the defendants' contention was correct. Brett, M. R., said:—"In the present case what are the damages recovered? Some of them are damages recovered in respect of the value of the ship; that is a salvage in respect of the loss of the ship; that goes to the underwriters on ship. But what are the other damages? The others are a salvage in respect of the loss of freight. To whom ought that to go? To the underwriters on freight. Why? Because the freight and the ship are not so joined together that a salvage on the loss of freight is a salvage on the loss of the ship. . . . This recovery of damages in respect of the loss of freight—a separate recovery in respect of a separate and different loss from the loss of the ship—is not a salvage in respect of the loss of the ship; therefore it ought not to go to the underwriters on ship." The Master of the Rolls then proceeds to point out the distinction between the case put forward on the part of the plaintiffs and the case where, after abandonment, freight is earned. In the latter case the freight earned is payable to the underwriters because, at the time when it was earned, they were the owners of the ship.

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Sect. 1240.

Assured must not prejudice insurer's rights of subrogation.

1240. An assured who has sustained a loss in respect of which he has a claim against some third party, if he intends to make a claim upon his policy, must take care not to come to any arrangement with such third party which may prejudice the insurer's rights of subrogation. If he effectually renounce any rights or remedies which he may have, he will be bound to give credit to his insurers for the value of such rights or remedies. The insurers will be entitled to say to him: "If you had not made that settlement, we should have been subrogated to your rights, which you would have handed over to us intact; and we should have got, and have been entitled to get, the whole of the benefit under them, or claim from you the whole of the benefit you received. If you have not received the benefit, but have given it up, that does not alter the quantum of your claim, which was really our claim; and therefore you are under an obligation, however it is to be expressed in point of law, to make that good to us" (*n*). Effect was given to this contention on the part of the insurer in the case from which the above passage is cited; and insurers who had paid a loss were allowed to recover from the assured for the value of the rights which the latter had surrendered.

Assured may give a conditional release.

There seems no reason, however, why an assured should not give the third party a release subject to the insurer's rights of subrogation (*o*). A release to a third party by an assured who has already, to the knowledge of the third party, received payment from his insurers, will be deemed to be in fraud of the insurer's rights, and consequently void (*p*).

(*n*) Per Collins, J., in West of England Fire Ins. Co. *v.* Isaacs, [1896] 2 Q. B. 377; affirmed in C. A., [1897] 1 Q. B. 226. In America cf. The St. John's (1900), 101 F. at p. 472, and cases there cited.

(*o*) Joyce, Ins. vol. iv. s. 3542.

(*p*) Joyce, vol. iv. s. 3544, citing Monmouth County Fire Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107.

CHAPTER X.

SETTLEMENT OF LOSSES.

	SECT.
Former Practice as to Settlement of Losses	1241
Effect of Adjustment	1242—1244
Subsequent Recovery of Thing Insured	1245
Recovery back of Losses improperly Paid	1246

Settlement of losses. Meaning of an adjustment of the policy, and former practice relating thereto.

1241. WHEN the amount of indemnity which the assured is entitled to receive, and the proportion of such amount which each underwriter is liable to pay on the sum by him subscribed, has been settled and ascertained, an indorsement is made on the policy, generally in the following, or some similar form:—"Adjusted the loss on this policy at ——*l.* per cent." (*a*). The policy thus indorsed is then taken round by the broker to the different underwriters, who respectively affix their initials to the memorandum, and very frequently, at the same time, strike a pen through their subscription at the foot of the policy. The policy thus indorsed is said to be adjusted: the loss, however, is not then paid; but, by the general usage of the trade, is understood to be payable at a

(*a*) The practice described here and in the passage which follows is now obsolete. The modern practice has been already described and considered in its proper place (see Part I. Chap. IV.). A loss is now usually said to be "settled"; a policy is not said to be "adjusted"; there is no such thing as "striking-off"; and the arrangements as to credit are quite different. Inasmuch, however, as all the cases to be presently referred to were decided when the practice here described was in vogue, it has been found necessary to retain this passage, so as to explain to the reader what the old practice was, and to enable him to understand the language used in the older reports. The change in practice does not appear to entail any change in the principles supported in our text.

Sect. 1241. [illegible] At the end of that year, the amount so entered to the debit of the underwriter in the broker's books is [illegible] drawn through his initials affixed to the memorandum of adjustment, and the loss is then said to be struck off, or settled in account. As between the broker and underwriter, it is frequently the case that no money ever passes, but the amount is merely carried to the credit and debit side of their mutual accounts, the general balance of which is made up at the end of every [illegible] year, and the excess of all the losses over the sums due for premiums, or vice versa, is either then paid or is suffered to run on as an item in the next year's account.

Effect of an adjustment [illegible]

As between broker and underwriter, directly the amount of the loss is entered to the debit of the latter in the broker's books, and his initials struck off the memorandum of adjustment, the account is finally settled, as far as regards the particular policy so adjusted. As between underwriter and assured, however, such adjustment, even where both the subscription of the underwriter to the policy, and also his initials affixed to the memorandum of adjustment, have been struck out, is no bar to an action by the assured on the policy, unless there be satisfactory evidence of express or implied consent on his part to be bound by the adjustment, as conclusive of his claims under the policy. Even then the mere erasure of the defendant's subscription (as distinct from his initials affixed to the memorandum of adjustment), is no proof of payment, but only of settlement on account; the general practice being, as we have just seen, to strike out the signature to the policy, without any money passing at the time, on the faith of a future settlement at the month's end (b).

Effect of adjustment as an admission of underwriter's liability.

1242. It was formerly a litigated question to what extent an adjustment thus indorsed on the policy operated as an admission of the underwriter's liability: it may now, however, be taken, as the fair result of the authorities, that an adjust-

(b) Adams v. Saunders (1829), 4 C. & P. 25; M. & Malk. 373.

ment is nothing more than a promise to pay, which is only binding when founded on the consideration of previous liability, and, that although *primâ facie* it imports consideration, yet an underwriter who has merely put his initials to it, but not paid the loss, may avail himself, at the trial, of any defence tending to show that he was never liable under the policy, and this, although he may have been aware of all the facts constituting such defence at the time of signing the adjustment. Sect. 1242.

In the earliest reported case on the subject, the indorsement on the policy being, "Adjusted the loss on this policy at 98*l.* per cent., which I agree to pay one month after date," Lee, C. J., was of opinion that an adjustment in this form was to be considered as a note of hand, and that plaintiff need not enter into proof of loss (*c*). Adjustment with a promise to pay.

Lord Kenyon, in all the cases of the kind that came before him at Nisi Prius, uniformly ruled that an adjustment was not conclusive where it could be shown to have been made under any misconception of the law or the fact (*d*). Effect of adjustment as an admission.

Lord Ellenborough carried out to the full, if, indeed, he did not extend, the same doctrine. Thus, in the first case of the kind which came before him, he allowed the defendants, notwithstanding the adjustment, to go into proof of a deviation in the course of the voyage, which being established, he nonsuited the plaintiff (*e*). In the next case, his Lordship allowed proof to be gone into of concealment at the time of effecting the policy, although it appeared that just before putting his initials to the adjustment, the defendant had read letters from the captain giving a full account of all the circumstances of the loss (*f*); in charging the jury on this occasion, the Chief Justice drew a

(*c*) Hog *v.* Gouldney (1745), Beawes, 460, 6th ed.; 1 Park, Ins. 266; 2 Marshall, Ins. 642; Hewit *v.* Flexney (1746), Beawes, 458, 6th ed.

(*d*) Rogers *v.* Maylor (1790), 1 Park, Ins. 267; Marshall, 644; De Garron *v.* Galbraith (1795), 1 Park, Ins. 267; and also Peake, Add. Cas. 37; Christian *v.* Coombe (1794), 2 Esp. 489.

(*e*) Sheriff *v.* Potts (1803), 5 Esp. 95.

(*f*) Herbert *v.* Champion (1807), 1 Camp. 133.

Sect. 1242. broad distinction between cases where, upon a dispute, the money is paid and those in which there is only a promise to pay; "if the money has been paid, it cannot be recovered back without proof of fraud; but a promise to pay will not in general be binding unless founded on a previous liability. What is an adjustment? An admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy. An underwriter must make a strong case after admitting his liability; but, until he has paid the money, he is at liberty to avail himself of any defence which the facts or the law of the case will furnish" (*g*).

Where underwriter ignorant of the facts.

1243. In the next case, Lord Ellenborough established the position that an adjustment is not binding on the underwriter, although at the time of signing it he had full means of rendering himself acquainted with the history of the voyage, and the manner of the loss, if his attention was not then peculiarly drawn to circumstances he afterwards learns, by which the underwriters are discharged. The facts of the case were shortly as follows: Before signing the adjustment, the defendant had read a statement, which was posted up at Lloyd's, to the effect that the ship had chased everything she saw, and been subsequently captured, owing to the cowardice of the captain. In reference to this statement, the defendant remarked, on signing the adjustment, that, as the captain was killed, it was not likely the ship was lost by his cowardice. Lord Ellenborough, notwithstanding the adjustment, allowed the defendant at the trial to go into evidence of deviation by cruising, which, being proved, he had a verdict (*h*). His Lordship on this occasion told the jury that the adjustment could not be binding on the defendant, unless the whole circumstances of the case "were all blazoned to him as they really were," and he desired them to consider whether or not at the time of the adjustment his attention was drawn only to the manner in which the ship was captured, and was not

(*g*) 1 Camp. 136.
(*h*) Shepherd *v.* Chewter (1808), 1 Camp. 274.

roused to the previous deviation, with which he afterwards became acquainted (*i*). Sect. 1243.

Lord Campbell, in a very able note to this case, intimates that, even had the previous deviation been brought fully before the defendant's notice, or, in the emphatic language of Lord Ellenborough, "blazoned to him as it really was," the adjustment would still not have precluded him from availing himself of the deviation as a defence to the action: the ground of his opinion being the principle laid down by Lord Ellenborough in Herbert *v.* Champion, that the underwriter, at any time before paying the loss, may take advantage of whatever grounds of defence his case offers, although he was actually aware of them when he signed the adjustment. Reasoning also from general principles of law, he remarks that, although an adjustment may *primâ facie* import consideration, yet it is not easy to imagine how the defendant should in any case be debarred from showing that in fact it was entirely without consideration, or how greater efficacy can be given to it than merely to transfer the burthen of proof from the assured to the underwriter (*k*). Burden of proof.

In a more recent case on the subject the following is the view expressed as to the effect of an adjustment:—"An adjustment has not the effect of determining absolutely the amount due, so as to dispense with the intervention of a jury; it is an instrument, or means, by which a jury may be led to the conclusion that the amount adjusted is the real amount of unliquidated damages, for which they are to give their verdict. It is only a means for enabling the jury to fix the amount for which the plaintiff sues in the shape of unliquidated damages, and not an amount binding upon the parties in all events" (*l*).

1244. If, indeed, the underwriter, besides signing the Effect of adjustment

(*i*) Shepherd *v.* Chewter (1808), 1 Camp. 275.

(*k*) 1 Camp. 275, n. See also 2 Selw. N. P. 922, 13th ed. Such seems to have been admitted to be the law in the two subsequent cases of Steel *v.* Lacy (1810), 3 Taunt. 285; Reyner *v.* Hall (1813), 4 Taunt. 725.

(*l*) Luckie *v.* Bushby (1853), 13 C. B. 864; 22 L. J. C. P. 220.

[illegible]

Mistake of fact.

[illegible] Where such receipt has been paid under a mistake of fact the case is different: thus where a policy on a ship "warranted free of capture in port" was subject to a return of premium, and the premium was actually paid back on receipt of a letter stating the capture to have been made in the port of Lisbon, but it afterwards appeared that this was a mistake, and that the capture had not been made in the port of Lisbon within the meaning of the warranty: the Court held that the assured was not entitled by the adjustment or repayment of the premium from receiving on the policy, though the underwriter's initials had been struck off from the indorsement, and his subscription from the face of the policy, for this must be regarded as the case of an instrument destroyed by mistake (o).

Effect of mistake.

1245. As we have seen, if a total loss have been adjusted

(m) Willis v. Lumley (1802), 2 Taunt. 449.

(n) May v. Christie (1815), Holt, N. P. 67.

(o) Haynes v. Hall (1813), 4 Taunt. 725. *A fortiori* this would be so where only the initials were struck off the adjustment, and the subscription left on the face of the policy. See *S. C.*

Sect. 1245.

recovery of thing insured.

and actually paid, the subsequent recovery of the thing insured undamaged, and only charged with a trifling sum as the expenses of its recovery, will not entitle the underwriter to recover back the money so paid; for the loss was total at the time of the adjustment, and the money was paid under no misapprehension of the state of the facts as they then existed (*p*). In such case, however, the underwriter, even without abandonment, will be entitled to the salvage, after deducting the expenses of its recovery (*q*); unless, indeed, he have waived his right thereto, as by declining an offer to abandon and inducing the assured to take less than a total loss, on condition of his (the underwriter) renouncing all benefit of future salvage (*r*).

If the underwriter have adjusted and paid a certain percentage on his subscription, on account, at a time when the circumstances of the case, being one of capture and confiscation of goods, were such as to amount to a constructive total loss, had notice of abandonment been given, but in the absence of such notice were held to amount to a partial loss only, he will not be allowed to recover back any part of the money so paid, because, ultimately, part of the proceeds of the property are restored to the assured, under such circumstances of increased value, that the amount so received, added to the money paid by the underwriter on the adjustment, together exceeds the whole amount of the insurance (*s*).

Recovery back of losses improperly paid.

1246. If, after a loss has been paid, the underwriter discovers that there was fraud, or misrepresentation, or concealment, in the original contract, or that there were other circumstances attending the loss, which, if known at the time the loss was claimed, would have justified his resisting the demand, he may maintain an action for money had and received against the assured, or the broker who has effected

(*p*) Da Costa *v.* Firth (1766) 4 Burr. 1966.

(*q*) *Ibid.*

(*r*) Blaauwpot *v.* Da Costa (1758), 1 Eden, 130; Brooks *v.* M'Donnell (1835), 1 Young & C. 500.

(*s*) Tunno *v.* Edwards (1810), 12 East, 488; Goldsmid *v.* Gillies (1813), 4 Taunt. 803.

Sect. [illegible] the policy to recover back the sum so paid. The action is [illegible] and may [illegible] be sustained against the broker if the latter have actually paid over the loss to the assured, or the principal, [illegible]. In such case the action should be brought against the assured himself. If, however, the broker has merely passed the loss in account with his principal, but not actually paid it over to him, this will be no answer to the action brought by the underwriter for its recovery (t), unless meanwhile those parties have been led by the broker to alter their legal position, as, e.g., if there have been subsequently such settlements in account as are tantamount to payment (u).

Payments made with full knowledge or means of knowledge of all the facts cannot, as we have seen, be recovered back (x), nor can they if voluntarily made under compulsion of legal process (y); unless, indeed, there have been such fraud as, when afterwards discovered, enables the insurer to reverse the judgment or set aside the process of the Court (z).

Recovery of salvage withheld. If, after payment of a total loss, the salvage or the proceeds of its sale be withheld from the underwriter, he may bring an action for money had and received against the assured (a); and will recover in such action unless he have done any act at the time of settling the loss (as by paying less than the whole amount of insurance in full of all demands), whereby he waives his claim to salvage (b).

(t) Buller v. Harrison (1777), 2 Cowp. 565; and see the principle of law well developed in the case of Cox v. Prentice (1815), 3 M. & S. 344.

(u) Holland v. Russell (1861), 1 B. & S. 424; 4 ibid. 14.

(x) Bilbie v. Lumley (1802), 2 East, 469; and note to Shepherd v. Chewter (1808), 1 Camp. 274.

(y) Marriot v. Hampton (1797), 7 T. R. 269: overruling Moses v. Macfarlane (1760), 2 Burr. 1005; and Livesay v. Rider 1797, cited 7 T. R. 269. See Marriot v. Hampton (1797), 2 Sm. L. C. 409, 10th ed.

(z) See 2 Marshall, Ins. 741.

(a) Roux v. Salvador (1836), 3 Bing. N. C. 288.

(b) Brooks v. M'Donnell (1835), 1 Y. & Coll. 520.

CHAPTER XI.

RETURN OF PREMIUM.

Return of Premium—	SECT.
Where Risk never commenced	1247—1252
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Return of premium.

1247. MONEY received upon a consideration which, from any cause, except the fraud of the party paying it, happens wholly to fail, is, thereupon, money held to the use of him that paid it. The premium in marine insurance is a sum of money paid by the assured to the underwriter in consideration of his taking upon himself the risk of a sea venture.

Risk, therefore, assumed by the underwriter on the one side, and the premium paid by the assured as the price of that risk on the other, are "correlatives, whose mutual operation constitutes the essence of the contract of insurance" (*a*).

Where the risk has not been begun, the premium is returned.

Hence, as Lord Mansfield expresses it, "There are two general rules established applicable to this question: the first is that where the risk has not been begun, whether this be owing to the fault, pleasure, or will, of the assured, or any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity; the underwriter receives a premium for running the risk of indemnifying the assured, and, to whatever cause it may be owing, if he do not in fact run the risk, the consideration for which the premium

(*a*) 2 Marshall, Ins. 648.

Sect. 1247. was put into his hands, fails, and therefore he ought to return it" (*b*).

But where an entire risk has once commenced, no proportionable return of premium is to be made.

Another rule is, that if an entire risk has once commenced, there shall be no apportionment or return of premium afterwards; for though the premium is estimated and the risk depends on the nature and length of the voyage, yet, if it was commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the entire risk, and no part of the consideration shall be returned (*c*).

In the application, however, of these principles, much nicety of discrimination has been shown by the English Courts, especially in determining whether, in the particular case, there has been an inception of an entire risk under the policy, or whether the risk insured, and consequently the premium, is apportionable.

Return of premium where risk has never commenced.

1248. Where the risk has never had an inception, whatever may have been the cause, even the neglect or fault of the assured himself, provided it be not his actual fraud, the premium shall be returned. The general law maritime agrees with our own on this point, and is based on the same principles (*d*).

Termination of risk before making of policy is no ground for return.

The mere fact, however, that the risk has terminated before the making of the policy, is no ground for return of premium, even though, according to the state of facts subsequently proved to have been in existence, there have been since the making of the policy no actual exposure of the interest assured to the perils insured against. An underwriter who had insured a cargo by the "Alata," lost or not lost, from Philadelphia to Rochfort, thinking the vessel was overdue, reinsured on the 23rd December with the plaintiff, neither of them knowing at the time of this policy being effected that the ship had safely arrived on 14th November previous, and without damage to her cargo. Assuming that the policy had

(*b*) Per Lord Mansfield in Tyrie *v.* Fletcher (1777), Cowp. 666.

(*c*) Per Lord Mansfield, Cowp. 666.

(*d*) See 2 Emerigon, c. xvi. s. 1, p. 186; 4 Boulay-Paty, 6; 1 Parsons, 505—517; and, for the French law, Code de Com. art. 349.

never attached, the defendant refused to pay the premium. The Court, however, held that it had attached, because the risk properly described in the policy had commenced, and although it had also terminated, that was not a fact at all relevant to the question. For, as Bramwell, L. J., pointed out, the fallacy of the argument for the defendant lay in this, that risk was assumed to mean chance of loss during the voyage, whereas in relation to the question argued, that term was used in the sense of voyage commenced with necessary conditions to make the underwriters liable (*e*). Sect. 1248.

1249. In the following cases, the inquiry has been whether the policy did or did not comprise several distinct risks, and the object has been to apportion the return of premium, with reference to such of those risks as may not have been commenced. Apportionable return of premium.

In the first reported case of the kind, a ship was insured, "lost or not lost, at and from London to Halifax, warranted to depart with convoy from Portsmouth, for the voyage." Before the ship reached Portsmouth, the convoy was gone. Notice of this was immediately given to the underwriters, who were requested either to make the long insurance, or to return part of the premium. On their refusal the action was brought, to recover back a proportionable part of the premium for the voyage from Portsmouth to Halifax. The jury at the trial having found that it was usual for the underwriters in such cases to return part of the premium (*f*), though the quantum was uncertain, Lord Mansfield and the Court of King's Bench held that the assured was entitled to a rateable return of premium as claimed (*g*). Stevenson *v.* Snow.

Lord Mansfield, in referring to this case on two subsequent occasions, said the decision depended on this, "that Lord Mansfield's explanation of this case.

(*e*) Bradford *v.* Symondson (1881), 7 Q. B. D. 456; Natusch *v.* Hendewerk (1871), *ibid.* 460, *in notis*. So 2 Phillips, Ins. s. 1826.

(*f*) Lord Mansfield, however, expressly said, "I do not go upon the usage" (p. 1240). But in the later cases, which are here referred to, he appears to have attached more importance to this point.

(*g*) Stevenson *v.* Snow (1761), 3 Burr. 1237; 1 W. Bl. 318.

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there was a contingency specified in the policy, upon the not happening of which the insurance would cease" (*h*); "the intention of the parties," he said, "the nature of the contract, and the consequences of it, spoke manifestly two insurances, and a division between them. The first object of the insurance was from London to Halifax; but if the ship did not depart from Portsmouth with the convoy specified, then there was to be no contract from Portsmouth to Halifax. The parties then have said, 'We make a contract from London to Halifax; but on a certain contingency it shall only be a contract from London to Portsmouth.' That contingency not happening, reduced it, in fact, to a contract from London to Portsmouth only. The whole argument turned on that distinction, and all the Judges, in delivering their opinions, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being, in fact, two voyages" (*i*). His Lordship also said, that, although the alleged usage was rejected by the Court, owing to the uncertainty as to the amount, yet it was considered to show the general sense of merchants, as to the propriety of some return being made (*k*).

Meyer *v.* Gregson.

In the next case of the same kind a ship insured "at and from Jamaica to Liverpool, warranted to sail on or before the first of August," did not sail till the 1st of September, so that, by this breach of warranty, the policy became invalid. The assured, however, contended that the risk was divisible, and had attached upon the ship while she lay in port at Jamaica before the 1st of August; he, however, gave no proof of an usage of trade to consider such risks divisible, or to make a rateable return of premium for the risk at the island. Under these circumstances the Court held there could be no apportionment, and Buller, J., said, "In all insurances from Jamaica, the policy runs 'at and from,' and though in many instances the voyage has not been commenced, yet there never

(*h*) In Bermon *v.* Woodbridge (1781), 2 Dougl. 789.

(*i*) In Tyrie *v.* Fletcher (1777), 2 Cowp. 669.

(*k*) *Ibid.*

was an idea of any part of the premium being returned; and no usage to do so has been found by the jury" (*l*). Sect. 1249.

1250. In a subsequent case Buller, J., rests this decision solely on the ground that no usage was found (*m*), and it is plain that on no other basis can it be reconciled with the two following cases:—

A ship, insured "at and from any port or ports in Jamaica to London, following and commencing from her first arrival there, warranted to sail with convoy for the voyage from the place of rendezvous," did not sail with convoy from the rendezvous, so that the warranty was broken, and the underwriters were off the risk, at all events from the time of sailing. But some evidence being given of an usage in such cases to apportion the premium, the jury thought that one half per cent. for the risk in port at Jamaica should be retained, and the residue for the risk from Jamaica to London returned. Lord Mansfield was of the same opinion, remarking, that wherever there is a contingency in the voyage, the risk may be divided, and that the reason why, in such cases, there are not two policies, is that the risk 'at' is capable of exact computation (*n*). Gale *v.* Machell.

In the next case, goods were insured "at and from Jamaica to London, warranted to depart with convoy for the voyage, and to sail on or before the 1st of August, &c.;" the ship sailed before the 1st, but without convoy; the assured brought his action for a proportionable return of premium in respect of the voyage from Jamaica to London. The jury found for the plaintiff, and also found specially "that it was the constant and invariable usage in insurances at and from Jamaica to London, warranted to depart with convoy, or to sail on or before a certain day, to return the premium, deducting half Long *v.* Allen

(*l*) Meyer *v.* Gregson (1784), 3 Dougl. 402; 2 Park, Ins. 796; 2 Marshall, Ins. 666.

(*m*) In Long *v.* Allen (1785), 4 Dougl. 278; 2 Marshall, Ins. 669. "In Meyer *v.* Gregson no usage was found."

(*n*) Gale *v.* Machell (1785), 2 Marshall, Ins. 667; 2 Park, Ins. 797.

Sect. 1244. followed by payment.

adjustment, has actually paid the loss with full knowledge or means of knowledge of all the circumstances, though in ignorance of the law, he is precluded from afterwards contesting his liability. Thus, where an underwriter who had paid a total loss claimed to recover it back on the ground that a material letter had not been disclosed to him before effecting the policy, but it appeared at the trial that, before signing the adjustment and paying the loss, all the papers had been laid before him, and, amongst the rest, the letter in question: the Court held that the money paid could not be recovered back, because it had been paid with full knowledge or means of knowledge of all the circumstances (*m*). So, where a policy had been adjusted for a return of premium, and the sum due in respect of such return had been actually paid, under full knowledge of all the circumstances, it was held that the assured could not again resort to the underwriter on the policy (*n*). But where such return has been paid under a mistake of fact the case is different; thus, where a policy on a ship "warranted free of capture in port," was adjusted for a return of premium, and the premium was actually paid back on receipt of a letter stating the capture to have taken place in the port of discharge, but it afterwards turned out that this was a mistake, and that the capture had not taken place in the port of discharge within the meaning of the warranty: the Court held that the assured was not precluded by the adjustment or repayment of the premium from recovering on the policy, though the underwriter's initials had been struck off from the indorsement, and his subscription from the face of the policy, for this must be regarded as the case of an instrument destroyed by mistake (*o*).

Mistake of fact.

Effect of subsequent

1245. As we have seen, if a total loss have been adjusted

(*m*) Bilbie *v.* Lumley (1802), 2 East, 469.

(*n*) May *v.* Christie (1815), Holt, N. P. 67.

(*o*) Reyner *v.* Hall (1813), 4 Taunt. 725. *A fortiori* this would be so where only the initials were struck off the adjustment, and the subscription left on the face of the policy. See *S. C.*

Sect. 1245.

Recovery of thing insured.

and actually paid, the subsequent recovery of the thing insured undamaged, and only charged with a trifling sum as the expenses of its recovery, will not entitle the underwriter to recover back the money so paid; for the loss was total at the time of the adjustment, and the money was paid under no misapprehension of the state of the facts as they then existed (*p*). In such case, however, the underwriter, even without abandonment, will be entitled to the salvage, after deducting the expenses of its recovery (*q*); unless, indeed, he have waived his right thereto, as by declining an offer to abandon and inducing the assured to take less than a total loss, on condition of his (the underwriter) renouncing all benefit of future salvage (*r*).

If the underwriter have adjusted and paid a certain percentage on his subscription, on account, at a time when the circumstances of the case, being one of capture and confiscation of goods, were such as to amount to a constructive total loss, had notice of abandonment been given, but in the absence of such notice were held to amount to a partial loss only, he will not be allowed to recover back any part of the money so paid, because, ultimately, part of the proceeds of the property are restored to the assured, under such circumstances of increased value, that the amount so received, added to the money paid by the underwriter on the adjustment, together exceeds the whole amount of the insurance (*s*).

Recovery back of losses improperly paid.

1246. If, after a loss has been paid, the underwriter discovers that there was fraud, or misrepresentation, or concealment, in the original contract, or that there were other circumstances attending the loss, which, if known at the time the loss was claimed, would have justified his resisting the demand, he may maintain an action for money had and received against the assured, or the broker who has effected

(*p*) Da Costa *v.* Firth (1766) 4 Burr. 1966.

(*q*) *Ibid.*

(*r*) Blaauwpot *v.* Da Costa (1758), 1 Eden, 130; Brooks *v.* M'Donnell (1835), 1 Young & C. 500.

(*s*) Tunno *v.* Edwards (1810), 12 East, 488; Goldsmid *v.* Gillies (1813), 4 Taunt. 803.

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Law in the United States.

1252. The general result of all the above cases seems to be, that where no usage is proved to the contrary, an entire premium cannot be divided and apportioned unless the risks are divided in the policy in such a manner as to show that the parties had distinct risks in contemplation; and the law as to this point seems to be the same in the United States (*y*).

In France.

In France the law, as fixed by the 356th Article of the Code de Commerce, is that on an insurance on goods for the round voyage, out and home, if no homeward cargo is in fact loaded on board, the underwriter shall only retain two-thirds of the premium, unless there be a stipulation to the contrary. Boulay-Paty, admitting the law to be as thus fixed by the Code, yet contends, and apparently with very good reason, that such a provision in cases where the outward and homeward passages together make one entire risk insured at one entire premium, is opposed to sound principle, and must be regarded as an anomalous exception to the general rules of Maritime Law on this subject (*z*).

Return of premium in cases of illegality or fraud.

1253. The decisions which we are about to refer to, in so far as the illegality in point consisted in the gaming or wagering nature of the contracts under which the premiums were paid (*a*), are now of less importance, owing to the provisions of the Gaming Act, 1892, which make it impossible to maintain any action for the recovery of any money paid under or in respect of any such contract. But in so far as such illegality is due to other considerations, for example where the voyage has been intended to cover an illegal traffic, as was the case in Palyart *v.* Leckie (*b*), their authority appears to remain unimpaired.

(*y*) Donath *v.* Ins. Co. of North America, 4 Dall. 463, cited 2 Phillips, Ins. s. 1834, and see the other cases cited there.

(*z*) 4 Boulay-Paty, Droit Mar. 97—100.

(*a*) It must be remembered that what are commonly called wager, or p.p.i. policies, are in practice often entered into with perfect *bona fides*, and without any intention to gamble; and it must not be assumed that such policies are "by way of gaming or wagering" within the meaning of the Gaming Acts. See *ante*, s. 315.

(*b*) 6 M. & S. 290.

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Where the risk is illegal, the assured shall not recover back the premium.

Where the risk has never commenced, the premium may be recovered back as money advanced without any consideration; but if it have been advanced on a consideration which fails because the contract is illegal—for example, a wager policy, or a policy to cover illicit or prohibited trading, and if the contract have been executed—then another principle comes into play, and the case falls within the rule *in pari delicto potior est conditio possidentis.* The assured, therefore, unless he was ignorant of the fact of the illegality (for ignorance of the law is no excuse), will not be entitled to any return of premium, unless indeed he should prefer his claim while the contract is still executory.

Wager policies. Lowry *v.* Bourdieu.

In one of the first cases in which the question arose, the policy was effected on the amount of a bond given by an East India captain to secure his private adventure, valued at 26,000*l.* "without further proof of interest than the bond, free of average and without benefit of salvage"; after the captain had arrived safe with his adventure, the assured claimed a return of the premium, on the ground that, this being a wager policy, the contract was void. Lord Mansfield, at the trial, being of this opinion, held that as both parties were *in pari delicto* the rule of *potior est conditio possidentis* applied, and that the plaintiffs could not recover the premium, and on motion for a new trial the Court took the same view.

Distinction between contracts executed and executory.

1254. The distinction above referred to between contracts executed and contracts executory appears to have been suggested for the first time in this case by Buller, J., who said: "There is a sound distinction between contracts executed and executory; and if an action is brought to rescind a contract, you must do it while the contract still remains executory, and then it can only be done on the terms of restoring the other party to his original situation. If the plaintiffs in the present case had brought their action before the risk was over and the voyage finished (*c*), they might have had a ground for their demand;

(*c*) It is doubtful whether the contract would not be considered to be executed within the meaning of the rule as soon as the risk commences.

Sect. 1254. but they waited till the risk (such as it was, not indeed founded in law, but resting in the honour of the defendant) had been completely run" (*d*).

This distinction has been adopted in subsequent cases, and it is now well established, after much expression of regret by learned judges over this deviation, that, so long as the contract remains executory, any money paid under it, such as premium in the case of insurance, may be recovered back (*e*). But it seems to be a condition to the right of action for this end that before writ issued the assured shall, by formal notice to the underwriter, have renounced his contract. When, therefore, a policy was effected on goods by the "Audaz" (a Spanish ship), or any other ship or ships, with the intention of covering an illegal shipment of cotton for Liverpool from New Orleans, a port of the United States, then at war with this country —but no shipment was ever made, or other thing happened within the scope of the policy, to make the risk attach, and the assured brought an action to recover back the premium on the ground of the illegality of the contract—the Court held that he could not recover, because he had not renounced the contract by notice to the underwriter before action brought (*f*).

Proviso.

If the risk has commenced, no return of premium in respect of illegal contract.

1255. Where the risk has commenced and the event taken place, the application of the general principle has never been doubted.

Thus, where the risk had commenced and a loss by capture

Mr. MacLachlan appears to have been of this view (Arnould, Mar. Ins. 6th ed. p. 1105); and cf. Herman *v.* Jeuchner (1885), 15 Q. B. D. 561, and Kearley *v.* Thomson (1890), 24 Q. B. D. 742.

(*d*) Lowry *v.* Bourdieu (1780), 2 Dougl. 468.

(*e*) Tappenden *v.* Randall (1801), 2 B. & P. 467; Aubert *v.* Walsh (1810), 3 Taunt. 277; Bone *v.* Ekless (1860), 5 H. & N. 925; 29 L. J. Ex. 438; Taylor *v.* Bowers (1876), 1 Q. B. D. 291; Herman *v.* Jeuchner (1885), 15 Q. B. D. 561; Leake on Contracts, 3rd ed. p. 672. It was doubted by Fry, L. J., in delivering the judgment of the Court of Appeal in Kearley *v.* Thomson (1890), 24 Q. B. D. at p. 746, but the learned Judge appears to be in error in stating that the principle is not to be found in any case earlier than Taylor *v.* Bowers.

(*f*) Palyart *v.* Leckie (1817), 6 M. & S. 290.

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taken place under a policy void as being a re-insurance within the 19 Geo. 2, c. 37, s. 4, the Court of King's Bench decided that there could be no return of premium (*g*). So, where it appeared that the policy had been effected in this country to cover a trading with Holland, then in a state of war with Great Britain, and a return of premium was claimed after the risk had been run and a loss by capture taken place, the same Court held on the same principle that no return could be made (*h*). On the same ground it was held that no return could be claimed in respect of a policy intended to cover a trade carried on in contravention of our navigation laws, when they existed; and this, though the assured be a foreigner, for that fact will not excuse his ignorance of the trade laws of the country with which he effects insurances and engages in commerce (*i*). It is otherwise, however, where the policy is effected in ignorance of the facts. Thus, where the agent of a foreigner effected an insurance in this country after hostilities had been actually declared against Great Britain by the foreign government of which the assured was a subject, but without any knowledge of that circumstance on the part of the agent, or any possibility of knowing it at the time of effecting the policy, the Court held that under these circumstances the premium should be recovered back, for the plaintiffs had paid for an insurance from which, without any fault imputable to themselves, they could never derive any benefit (*k*).

Except where there has been ignorance of fact.

So where a licence necessary to legalize the voyage was—without the fault or knowledge of the assured, and contrary to the opinion and expectation which they might reasonably entertain—not procured till after the ship had sailed; this was held to fall within the same principle as the case last cited, and the plaintiff was allowed a return of premium (*l*).

(*g*) Andree *v.* Fletcher (1789), 3 T. R. 266; Howard *v.* Refuge Friendly Society (1886), 54 L. T. 644.

(*h*) Vandyck *v.* Hewitt (1800), 1 East, 96.

(*i*) Morck *v.* Abel (1803), 3 B. & P. 35; *S. P.* Lubbock *v.* Potts (1806), 7 East, 449.

(*k*) Oom *v.* Bruce (1810), 12 East, 225.

(*l*) Henry *v.* Staniforth (1816), 4 Camp. 270; *S. C.* as Hentig *v.* Stani-

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Where, however, the want of the licence at the time of sailing was a fact within the knowledge of the assured, it was held that he could claim no return of premium, though the licence was procured as soon as possible after the ship sailed (*m*).

Illegality no defence for an agent against his principal.

Yet illegality of contract is no defence, except for a principal; a mere agent cannot stop the money and set up this as a bar to the action. When, therefore, a loss, notwithstanding the illegality of the transaction, was paid by the underwriter to the broker of the assured, this defence failed the broker in an action by his principal to recover the money (*n*). Nor does this position appear to be affected by the provisions of the Gaming Act, 1892 (*o*).

Premium must be returned wherever the policy is rendered void by the fraud of the underwriter.

1256. It never has been doubted, and indeed on principle is abundantly clear, that the premium must be returned whenever the policy is rendered void by the fraud of the underwriter. As, if an insurance be made on a certain voyage "lost or not lost," when the underwriter, at the time he subscribes the policy, privately knows that the ship has arrived safe, he will be bound to restore the premium (*p*). So, if the contract be void by the positive misrepresentation of the underwriter, the assured may recover back the premium (*q*); though a mere statement of the underwriter's belief or expectation would not entitle him to do so (*r*).

No return where the fraud is on the part of the assured.

For some time, however, it was a subject of very fluctuating decision in our English Courts, whether the assured was or was not entitled to a return of premium where the contract

forth (1816), 5 M. & S. 122. See also Siffken *v.* Allnutt (1813), 1 M. & S. 39.

(*m*) Cowie *v.* Barber (1815), 4 M. & S. 16.

(*n*) Tennant *v.* Elliot (1797), 1 B. & P. 3; Farmer *v.* Russell (1798), *ibid.* 296; Bousfield *v.* Wilson (1846), 16 L. J. Ex. 44.

(*o*) De Mattos *v.* Benjamin (1894), 63 L. J. Q. B. 248; Burge *v.* Ashley, [1900] 1 Q. B. 744, approving O'Sullivan *v.* Thomas, [1895] 1 Q. B. 698.

(*p*) Lord Mansfield in Carter *v.* Boehm (1766), 3 Burr. 1909.

(*q*) Duffell *v.* Wilson (1808), 1 Camp. 401.

(*r*) Pawson *v.* Watson (1778), 2 Cowp. 787; Barber *v.* Fletcher, 1 Dougl. 292.

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was rendered void *ab initio* by his own fraud (*s*). The point, however, agreeably to truer notions of justice and good policy, is now clearly established in our English jurisprudence, that wherever the contract is avoided by gross and actual fraud on the part of the assured, whether committed by himself or his agent, there shall be no return of premium (*t*).

Aliter, in case of mere misrepresentation without fraud.

There must, however, be actual fraud on the part of the assured or his agents thus to preclude him from recovering back the premium; a mere misrepresentation made without actual fraud (*i.e.*, wilful intention to deceive) does not disentitle the assured to a return of premium. "Where there is fraud," says Gibbs, C. J., "there is no return of premium, but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium" (*u*).

Premium returnable where policy rendered void *ab initio* by the fault of the assured in not complying with warranties, &c.

In the same way, where the contract is avoided, *ab initio*, by the fault of the assured (under such circumstances as not to imply actual fraud) in failing to comply with any warranty, either express or implied, the assured will be entitled to a return of premium. Thus, if the ship do not sail on the day prescribed, or do not depart with convoy, or be not seaworthy, and there be no fraud on the part of the assured, he may recover back the premium (*x*).

(*s*) See the cases of Whittingham *v.* Thornburgh (1690), 2 Vernon, 206; Da Costa *v.* Scanderet (1723), 2 P. Will. 170; Wilson *v.* Ducket (1762), 3 Burr. 1361. The two first at Chancery, and the last at Common Law before Lord Mansfield, are in favour of allowing the return even in cases of gross fraud.

(*t*) Tyler *v.* Horne (1785), 2 Marshall, Ins. 661; Chapman *v.* Fraser (1793), *ibid.* In Tyler *v.* Horne the fraud was very gross, for the assured had instructed his broker to effect the policy after receiving private information of the loss of the ship. The fraud must, however, probably be in the procuring of the contract. In Waters *v.* Allen (1843), 5 Hill, N. Y. 421, the voyage was divided by the policy into two distinct risks, to each of which a separate premium was affixed. Soon after the commencement of the earlier risk the vessel was fraudulently scuttled by the assured, so that the later risks were never incurred. It was held that, notwithstanding such fraud, the premium for the latter might be recovered back.

(*u*) Feise *v.* Parkinson (1812), 4 Taunt. 639; acc. Anderson *v.* Thornton (1853), 8 Exch. 420; Rivaz *v.* Gerussi (1880), 4 Asp. M. L. C. 377; 6 Q. B. D. 222.

(*x*) 2 Marshall, Ins. 663. Numerous

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Or by making a material alteration.

If the policy is rendered void by the act of the assured in making a material alteration in it after subscription, and without consent of the underwriters, the assured will not be entitled to a return of premium (*y*).

Return of premium for want of interest, &c.

1257. We have seen that, if the risk have once commenced, there can be no return of premium in respect to its greater or less duration; and the reason is very plain, because the degree of risk cannot be calculated by duration—*i.e.*, it may be as great in a day as in a month. It is otherwise with the amount of the insurable interest or the value at risk, it being abundantly obvious that upon two lots of property of different values exposed to the same perils the degree of risk is very different. The risk, in fact, varies with the value.

Where no interest at risk.

Hence, where the assured has no interest covered by the policy, either because the interest in respect of which he insures is only a bare contingency or expectation, and not an insurable interest, or because he effects an insurance on the wrong ship, in either case he is entitled to a return of premium.

The rule in fact is, that if through mistake, misinformation, or any other innocent cause, an insurance be made without any interest whatsoever, the insured is entitled to recover back the whole premium (*z*).

In a case of re-insurance made in ignorance by both parties

cases decide this point incidentally. Henckel *v.* Royal Exchange Ass. Co. (1749), 1 Ves. 317 (breach of warranty of neutrality); Allen *v.* Long (1785), 2 Marshall, Ins. 668 (to sail with convoy); Annen *v.* Woodman (1810), 3 Taunt. 299 (unseaworthiness); and Colby *v.* Hunter (1827), 3 C. & P. 7 (warranted in port). In all these cases return of premium was claimed and allowed. The rule has been explicitly recognized in the jurisprudence of the United States. 2 Phillips, Ins. s. 1844; 1 Parsons, 505. But it is nevertheless at least doubtful whether an insurance "at and from" is void *ab initio* by reason of the fact that a warranty to be subsequently performed—*e.g.*, that the vessel shall sail by a certain date—is infringed. Where all warranties have been complied with which could be complied with during the vessel's stay in port, has not the policy attached, and can there under such circumstances be any return of premium?

(*y*) Langhorn *v.* Cologan (1812), 4 Taunt. 30.

(*z*) For almost every position upon the subject which follows, see the great work of Emerigon, c. xvi. Du Ristourne.

that the vessel had arrived and delivered her cargo undamaged, it was argued for the defendant, who refused to pay the premium, that under the circumstances there was no insurable interest in the defendant. The Court, however, having first held that the policy had attached notwithstanding the fact of the risk having terminated beforehand, held further that their opinion on the first point necessarily involved their holding that the defendant had an insurable interest (*a*). Sect. 1257.

1258. Under the old Prize Acts, where captors from the moment of capture acquired a contingent insurable interest—liable indeed to be divested by subsequent sentence of restoration, but valid till then,—and sent home their prize under an insurance on their own account, after which, upon arrival, she was by sentence of the English Court of Admiralty restored to her owners—it was yet held that, as the risk on the ship had commenced under the policy, the assured could not claim a return of premium (*b*). But where they had not even a contingent insurable interest in her, but merely a bare expectation depending on the bounty of the Crown—if in such case, after a loss, the underwriters availed themselves of the want of interest to defeat the claim on the policy, the assured were entitled to a return of premium (*c*). Instances under the Prize Acts.

In this last cited case, after a loss, the underwriters, who resisted the demand on the ground that there was no insurable interest, were not allowed to retain the premium; but where the ship had arrived safely and earned freight, Lord Ellenborough would not allow the assured afterwards to claim a return of premium, on the ground that he had no insurable interest, on account of a defect in his title to the ship. "The voyage," he said, "has been performed, and the ship has arrived in safety. The freight has been earned and paid. It strikes me as now too late to rip up the matter

(*a*) Bradford *v.* Symondson (1881), 7 Q. B. D. 456. See *S. C.*, *ante*, s. 1248.

(*b*) Boehm *v.* Bell (1797), 8 T. R. 154.

(*c*) Routh *v.* Thompson (1809), 11 East, 428.

Sect. 1258. and to say you had no insurable interest. You might have rescinded the contract before the event; but after that has been determined in favour of the underwriters, it does not lie in your mouth to tell them they were never liable, and that the premium was a payment without consideration" (*d*).

Where insurance is effected by mistake, as on goods by the wrong ship, the assured is entitled to a return.

So much for cases turning on the mere want of insurable interest. Of course, if by mistake an insurance is effected on goods on board the wrong ship, &c., and it turns out that the assured has no scintilla of interest at risk under the policy, he will be entitled to a return of the whole premium (*e*).

In case of over-insurance, double insurance, &c.

1259. With regard to return of premium for short interest, over-insurance and double insurance, the principle on which the cases depend is simply this: That if the underwriter could at any time, and under any conceivable circumstances, have been called on to pay the whole sum on which he has received premium, in such case the whole premium is earned, and there shall be no return; if, on the other hand, he could never in any event have thus been called on to pay the whole, but only a part of the amount of his subscription—say a half or a fourth—he ought not to retain a larger proportion than one-half or one-fourth of the premium, and must return the residue (*f*).

Short interest.

The cases in which he may be so called on to make return are, 1st, where in either a valued or open policy only part of the property specified in, or declared on, the policy is put on board—as, for instance, if "100 bales of cotton" be insured "valued at 1,000*l.*," or "at 10*l.* per bale;" or if "100 bales of cotton" be specified in the policy as the subject of insurance without any valuation—in such or the like cases, if there be only 50 bales on board, or only half the quantity of interest intended, and declared to be insured, a return of half the premium must be made for short interest (*g*).

(*d*) M'Culloch *v.* Royal Exch. Ass. Co. (1813), 3 Camp. 406.

(*e*) Martin *v.* Sitwell (1691), 1 Shower, 156.

(*f*) Stevens, Av. 200, 203; 2 Marshall, Ins. 649. See this test applied in Fisk *v.* Masterman (1841), 8 M. & W. 165; and see also 2 Magens, 137, note to No. 534.

(*g*) Stevens, 204.

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Where "freight" is insured generally, in a valued policy, at a gross sum on a general or seeking ship, this must be taken to mean freight on a complete cargo; if, therefore, at the time of loss there is less than the freight of a complete cargo at risk, it should seem that there must be a proportionate return of premium for short interest (*h*). So, in the case of an insurance "on profits," if the profits on a certain quantity of goods are insured and only part of the goods be put at risk, it has been held that the assured is entitled to a rateable return of premium (*i*).

Return of premium for over-insurance.

1260. The next case is, where in an open policy on goods or freight the sum insured (*i.e.*, the aggregate of the different subscriptions) exceeds the value of the property at risk, as, for instance, if the amount underwritten be 1,000*l.* and the insurable value of the goods on board be only 500*l.*, it is evident that the underwriters in case of loss could only have been called upon to pay to the extent of 500*l.*, or half the sum insured; consequently, by the rule above stated, there must be a return of half the amount of the premium. This is called a return for over-insurance.

No return on valued policies for over-insurance.

In valued policies, as we have already seen, the valuation is binding on the underwriter, so that the assured, in case of loss, supposing the whole of the property to which the valuation refers to have been then on board, will be entitled either to the whole or an aliquot part of the whole sum. As, therefore, the underwriters upon such a policy might, in the event of a total loss, have been called upon to pay the whole sum insured, they are entitled to retain the whole premium, and no return can be made for over-insurance, though the sum in the policy may be double the value of the effects insured (*k*).

(*h*) Forbes *v.* Aspinall (1811), 13 East, 323. The point was not determined in this case, but appears to follow from the principles regulating return of premium. See also as to goods, Rickman *v.* Carstairs (1833), 5 B. & Ad. 651; Tobin *v.* Harford (1863), 32 L. J. C. P. 134; 34 L. J. C. P. 37.

(*i*) Eyre *v.* Glover (1812), 16 East, 218.

(*k*) Stevens, 200; 2 Marshall, Ins. 652, citing 2 Magens, 137, n.

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Return of premiums in cases of double insurance.

Where, after effecting one insurance on his property, the merchant, ignorant of its real value and wishing to be fully protected, effects further insurances on the same property by other policies with a different set of underwriters, the law is that if the total amount thus insured on the different policies exceeds the insurable value of the property at risk, the merchant can only recover up to the extent of such value; but may do so from whichever set of underwriters he pleases (*i.e.*, up to the extent of their subscriptions), leaving the different underwriters to contribute rateably amongst themselves to the loss. There is also no doubt that, in such cases of double insurance, the assured is entitled to a rateable return of premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the property at risk.

Apportionment of return of premium among the several insurers.

1261. It remains only to consider how the return of premium in such cases is apportioned amongst the underwriters themselves.

On a single policy.

In the first place, it is clear that, where the over-insurance is by a single policy, all the underwriters contribute rateably to the return of premium without regard to the date of their subscriptions; the rule, as laid down by Marshall, being, that "all the underwriters upon a policy in which the effects are insured beyond their value, must bear any loss that may happen, and repay a part of the premium in proportion to their respective subscriptions, without regard to the priority of their dates" (*l*).

On several policies of the same date.

It is also stated by Emerigon, as the rule of the law maritime, that several policies effected on the same date are considered to form but one policy, and the rule, therefore, as to the return of premium in this case is the same as in the last (*m*).

On several policies of different dates.

But where several policies or sets of policies are effected on the same subject at different dates, the foreign law maritime regards only the policy or policies first in point of

(*l*) 2 Marshall, Ins. 649.

(*m*) 2 Emerigon, c. xvi. s. 4, p. 196.

See also the case of Fisk *v.* Masterman (1841), 8 M. & W. 165.

date as binding, up to the amount of the value actually at risk, and the return of premium is confined to the underwriters on the other policies (*n*). Sect. 1261.

The rule of the English law attaches no importance, except in the one case hereinafter to be mentioned, to such difference of date, and is thus correctly expressed by Marshall:—"If, by several policies made without fraud, the sum insured exceed the value of the effects, these several policies will in effect make but one insurance, and will be good to the extent of the interest of the assured, and, in case of loss, all the underwriters on the several policies shall pay according to their respective subscriptions; and it follows from thence, that all the underwriters on the several policies would be equally bound to make a return of premium for the sum insured above the value of the effects in proportion to their respective subscriptions" (*o*).

1262. The exception above referred to arises in cases where, of the several policies effected on the same subject at different dates, the earlier have actually attached before the later have been underwritten. Under such circumstances, the later only are subject to a claim for return of premium in case of over-insurance, because until their execution the earlier were sustaining a risk equal to the full amount of the sums subscribed. This was determined on the following state of facts:—A merchant in New Orleans, having shipped a large consignment of cottons to a Liverpool house, directed them to effect an insurance, which they immediately did, on the 12th of April, by several policies in London to the amount of 14,150*l.*, and on the 13th of April, by several other policies, both in Liverpool and at London (the agents in the one place being unaware of what was being done at the other), to the amount of 22,300*l.* more. Thus the total amount insured was 36,450*l.*, and the value of the cottons as fixed by the different

No apportionment where whole risk has once attached on the earlier policies.

Fisk *v.* Masterman.

(*n*) Emerigon, c. xvi. s. 4, pp. 140, 141.

(*o*) 2 Marshall, Ins. 649. See Stevens, Av. tit. Return of Premium, 205, and also M'Culloch's Com. Dict. tit. Mar. Ins. 750, ed. 1880.

Sect. 1262. policies was 30,333*l.*, which left 6,117*l.* as the amount of over-insurance on the aggregate of all the policies. The cottons having arrived safely, the Court, after argument, decided that as, in case a loss had occurred before the policies of the 13th of April were effected, the underwriters upon the policies of the 12th of April would have been liable to the full extent of their subscriptions, so they were entitled to retain the whole amount of their premiums.

The Court directed accordingly, 1. That the assured should have a return of premium to the amount of the over-insurance, such amount to be ascertained by taking into account all the policies; 2. That no return of premium was to be made in respect of the policies effected on the 12th of April; 3. But that all the underwriters who subscribed the policies of the 13th should contribute rateably to the return, in proportion to the sums insured by them respectively on that day (*p*).

Rule and practice in the United States.

In the United States, policies usually contain stipulations whereby, if the assured has made any prior insurance on the property, the insurers are to be answerable only for so much as the amount of such prior insurance may be deficient towards covering the property, and shall return the premium upon so much of the sum insured as they shall be exonerated from by such prior insurance (*q*).

Return of premium under express stipulation.

1263. It is frequently agreed between the parties that, upon the happening of a certain event, or the performance of some stipulation, the assured shall return a part of the premium,

(*p*) Fisk *v.* Masterman (1841), 8 M. & W. 165. Arnould (2nd ed. p. 1227) considered that this case decided that in all cases of over-insurance by several policies on different dates, the liability to return premium is thrown solely upon the later insurers, whether or not the risk had already attached on the prior policies when the later sets were entered into. The view, however, taken in the text is that of Phillips, s. 1838, and was that adopted by Mr. MacLachlan (Arnould, Mar. Ins. 6th ed. p. 1114).

(*q*) 2 Phillips, Ins. s. 1839. A similar rule prevails in most other countries, causing confusion, as Lowndes observes, when part of an insurance is effected here and part abroad: Lowndes, Mar. Ins. s. 53.

and clauses to this effect are accordingly in such case inserted in the policy (*r*). Sect. 1263.

The clause which has given rise to the greatest amount of discussion in our jurisprudence, is that which provides for a return of part of the premium in case the ship "sails with convoy and arrives." In case the ship sails with convoy, and arrives.

The reason for this stipulation, and the meaning of the parties in inserting it, is thus expressed by Lord Mansfield: "Dangers of the sea are the same in time of peace and of war, but war introduces hazards of another sort, depending on a variety of circumstances, some known, others not, for which an additional premium must be paid. These hazards are diminished by the protection of convoy. If the assured will warrant a departure with convoy, there is a diminution of the risk; but if he will not, he pays the full premium, and in that case the underwriter says, 'if it turn out that the ship departs with convoy, I will return part of the premium.'" "But," continues his Lordship, "a ship may sail with convoy, and yet, by storm or other accident, may in a day or two lose its protection: to guard against that risk the underwriter adds in policies of the present sort, 'the ship must not only sail with convoy, but she must arrive in order to entitle you to the return.'"

The words "and arrives" do not mean that the ship shall arrive in company of the convoy; but only that she herself shall arrive. If she does, that shows either that she had convoy for the whole voyage, or did not want it (*s*).

So, in the case of Simond *v.* Boydell itself, Lord Mansfield decided that though the policy was on goods, upon which the underwriters had paid an average loss in respect of sea damage incurred before the ship's arrival, yet, as the ship herself had sailed with convoy, and ultimately arrived safe at her port of destination, the assured, under a stipulation to return 8 per cent. if the ship "sails with convoy and arrives," was entitled to a full return of 8 per cent. on the whole Simond *v.* Boydell.

(*r*) Stevens, Av. 194.

(*s*) Simond *v.* Boydell (1779), 1 Dougl. 270, 271.

Sect. 1263. amount of the insurance, including therein the sum which the underwriters had paid as a loss on the damaged goods (*t*).

Aguilar *v.* Rodgers.

Upon the authority of this case Lord Kenyon decided that, in a policy on freight, with a stipulation to return 10 per cent. "if the ship sailed with convoy and arrived," the assured was entitled to the whole return calculated on the whole amount of the insurance, because the ship, though she had been captured and recaptured on her voyage, was ultimately brought into her port of destination, subject, however, to a charge of 9*l.* 14*s.* per cent. for salvage, which the underwriters paid into Court (*u*).

Arriving captured.

In this case Lord Kenyon said that in order to satisfy the meaning of the clause, the arrival of the ship should "be an arrival at the destined port in the course of the voyage;" and he intimated, that if a ship arrived at her neutral port of destination, in the possession of the enemy, or at her port in this country, as the property of other persons, after a capture, that would not be such an arrival as to entitle the assured, under this clause, to a return of premium (*x*).

Capture after arrival.

If goods are insured with a stipulation to return a certain rate of premium "if ship sails with convoy and arrives," and the ship does sail with convoy and arrives at her port of discharge, though she be there captured before she have completed the unloading of her cargo, so as to be totally lost with the residue of the goods on board, the assured will be entitled to the stipulated return of premium, in addition to the whole sum insured as for a total loss (*y*).

1264. In fact, in all these cases, the arrival of the ship is the sole test of the return of premium, and no regard is had

(*t*) Simond *v.* Boydell (1779), 1 Dougl. 268. But it is now an established custom of Lloyds, which has been expressly adopted by the Association of Average Adjusters, that when the words "and arrival" follow the stipulation for a return of premium on a policy on goods, the particular average, but not the special charges, is deducted from the amount insured, in order to arrive at the amount on which the return is calculated. So Stevens, Av. 198.

(*u*) Aguilar *v.* Rodgers (1797), 7 T. R. 421; Stevens, Av. 198.

(*x*) 7 T. R. 422.

(*y*) Horncastle *v.* Haworth (1806), 2 Marshall, Ins. 681.

by the parties to the condition of the goods on the ship's arrival. The total or partial loss of the goods is the subject of the indemnity, and must be paid by the underwriters. "But, as to the return of the additional premium, whether the goods arrive safe or not makes no part of the question; the single principle which governs is, that in the events which have happened, the war risk has been rated too high" (*s*). Sect. 1264.

Arrival to be at the ultimate port of destination.

The words "and arrive" may be so used as to mean arrival at the ship's ultimate port of destination; so that if it be agreed in the policy to return different portions of the premium in case the ship sail with convoy for different portions of the voyage and arrive, no return of any portion of the premium can be claimed if the ship never, in fact, arrives at her port of ultimate destination.

Kellner *v.* Le Mesurier.

A ship was insured "at and from Lisbon to Cadiz, and at and from thence to Flushing, at a premium of twenty guineas per cent., to return 8 per cent. if the ship sail with convoy from Cadiz to England, and 2 per cent. more for convoy from England to Flushing; or 10 per cent. if with convoy for the voyage and arrives." After reaching England from Cadiz with convoy, she was lost by British capture before her arrival at Flushing. Lord Ellenborough held, that no return could be claimed within the meaning of this policy, as the ship had never arrived at Flushing, her ultimate port of destination; the words "and arrives," his Lordship said, annexed a condition which overrode equally all the stipulations in the policy as to returns of premium; and the true meaning of the clause was this: to return 10 per cent. if the ship sail with convoy for the voyage and arrives; if from Cadiz with convoy for England, 8 per cent.; and 2 per cent. more for convoy from England to Flushing (*a*).

Leevin *v.* Cormac.

In this case the arrival at Flushing was held, on the true construction of the policy, to be a condition affecting all the preceding stipulations; where, however, the stipulation was

(*s*) Per Lord Mansfield in Simond *v.* Boydell (1779), 1 Dougl. 271.

(*a*) Kellner *v.* Le Mesurier (1803), 4 East, 396.

Sect. 1264. "to return 5 per cent. if the ship sails with convoy for Gottenburg, and arrives, and 5 per cent. more if she sails for her port of delivery and arrives;" the Court of Common Pleas thought it questionable whether a return of premium might not be due for her arrival at Gottenburg, though she never arrived at her ultimate port of delivery (*b*).

Stipulation to return a portion of the premium "for arrival."

1265. During the great European war and Napoleon's continental system, a practice sprang up, which ceased with the state of things that called it forth, of stipulating to return a portion of the premium "for arrival" (*c*). In the only case of this kind which came before the Courts, goods were insured on a Baltic risk, with the usual latitude as to touching and staying, sailing backwards and forwards, &c., "until the captain could find a port," the risk on the goods to continue till the same should there be discharged and safely landed with a warranty to be free from capture or seizure in the ship's port or ports of discharge, at a premium of fourteen guineas, to return 7 per cent. for arrival. The goods being seized on board the ship while moored in Pillau Roads for the purpose of discharging, were held to have been seized in the ship's port of discharge within the warranty. The underwriters consequently were discharged from the loss; but the Court nevertheless held, that there had been such an arrival of the ship as to entitle the assured to the stipulated return of premium (*d*).

It is clear from this case that it is no objection to the claim for a return of premium that the loss was one not insured against, provided the ship have arrived (*e*).

"If the ship sails with convoy."

1266. Where the words "and arrives" are not inserted, but the stipulation is simply for a return, "if the ship sails with convoy," the construction is different, and the rule of Simond *v.* Boydell will not apply.

(*b*) Leevin *v.* Cormac (1812), 4 Taunt. 483, n.

(*c*) Stevens, Av. 198.

(*d*) Dalgleish *v.* Brooke (1812), 15 East, 295.

(*e*) Same rule in the United States: 2 Phillips, Ins. s. 1840.

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Hence, where, in an insurance on goods, with a stipulation to return so much per cent. "for convoy," the assured claimed to recover the stipulated return (on the ground that the ship had sailed with convoy) in addition to a total loss: the jury refused to give it, saying that the assured had a right, in case of a total loss, to add the whole amount of premium to his invoice, and so could recover it in that shape included in the total loss. Sir James Mansfield, before whom the cause was tried, did not object to this, nor was the Court moved upon it (*f*).

Langhorn *v.* Allnutt.

If a return of premium be stipulated, in case the ship sails with convoy, and, before she can do so, the underwriters are discharged by a breach of warranty, the assured will, it seems, be nevertheless entitled to the stipulated return (*g*).

What constitutes a sailing with convoy so as to entitle the assured to claim a stipulated return of premium within the meaning of these clauses, may be seen by the following case: A ship, insured "at and from Oporto to Leghorn at twelve guineas per cent., to return 6*l.* if she sail with convoy from the coast of Portugal and arrive," sailed under convoy from Oporto to Lisbon, the general rendezvous, in order to proceed thence with the whole fleet. The Oporto fleet, however, being dispersed on its way to Lisbon, lost the convoy, on which the ship in question, then judging it for the best, ran for England, and arrived. Lord Eldon held that, upon the true construction of this clause, which only required a sailing with convoy from some part of the coast of Portugal, the assured was entitled to the stipulated return of premium by the ship's having sailed with convoy from Oporto and arrived in England (*h*).

What constitutes a sailing with convoy. Audley *v.* Duff.

1267. It is common now, in time policies, to insert a clause providing for the reduction of premium in the event of the vessel not being continuously employed during the whole

(*f*) Langhorn *v.* Allnutt (1812), 4 Taunt. 511; 2 Marshall, Ins. 676. As to the old practice on this point, see Stevens, Av. 196.

(*g*) Meyer *v.* Gregson, 2 Marshall, Ins. 682.

(*h*) Audley *v.* Duff (1800), 2 B. & P. 111.

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period covered. The clause takes various forms (*i*); under the Institute Time Clauses it runs as follows:—

To return { £ per cent. for each uncommenced month if it be mutually agreed to cancel this policy; As follows for each consecutive thirty days the vessel may be laid up in port, viz.:— £ per cent. if in the U. K. not under average. £ per cent. under average, or if abroad; } and arrival.

"If ship sold or laid up." Hunter *v.* Wright.

Under a stipulation in a time policy on a ship "for a return of premium if sold or laid up for every uncommenced month," the assured was not entitled to a return by reason of the ship's having been laid up for several months out of the year for which the policy was in force, as it appeared that she was employed again within the year: for the words "laid up," being in connection with the word "sold," must be taken to mean such a permanent laying up as would take place if the ship had been sold, and would put a final end to the policy (*k*).

It is also common to provide for the return of a portion of the premium, on condition that the vessel shall not be employed except in certain specified trades, or within a specified area. Where a vessel was insured for twelve months at eight guineas per cent., "returning one guinea per cent. if vessel employed in Eastern trade during the whole currency of this policy," and the vessel was totally lost before the expiration of the twelve months, but having been until her loss only employed in such trade, it was held that the currency of the policy ended when the ship was lost, and that her owners were therefore entitled to the return (*l*).

These are the more ordinary stipulations of this nature, and they fully illustrate the rules applicable to cases of this kind in general. Of course, it is open to the parties to stipulate that the happening of any specified event shall entitle

(*i*) See Douglas Owen's Mar. Ins. Notes and Clauses, 3rd ed. pp. 121—123.

(*k*) Hunter *v.* Wright (1830), 10 B. & Cr. 714.

(*l*) Gorsedd SS. Co. Ltd. *v.* Forbes (1900), 5 Com. Cas. 413.

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the assured to a return of so much per cent. of the premium (*m*).

Deduction of one-half per cent.

The old custom (*n*), in virtue of which the underwriter used to be allowed to deduct one-half per cent. from the amount of returnable premiums, is now obsolete in this country.

Practice as to paying the premium into Court.

1268. In all cases where there is reason to suppose that the assured may be entitled to claim a return of premium, it will be advisable for the underwriter, in defending an action on the policy, to pay the premium into Court, so as to escape liability for costs (*o*).

Counsel need not open for a return of premium.

Lord Eldon, while Chief Justice of the Common Pleas, was of a different opinion as to the necessity for opening this question to the jury; but it subsequently became the established practice for the plaintiff's counsel not to announce at first any intention to claim a return of premium; so that if the defendant's case proved him to be entitled thereto, he recovered it as money received at any time before verdict; he thus obtained the full advantage which the evidence produced entitled him to, without disparaging his own case at the outset by setting up a demand implying a doubt, at least, of being able to sustain his principal claim (*p*).

Effect of taking money out of Court.

But suppose the plaintiff should, without damage to his own case on the record, be able to take this money out of Court, replying at the same time damages *ultra*, and the jury should ultimately find him entitled to his principal demand, a thing inconsistent with any title to a return of the premium, the Court would not allow him to recover more than the amount of such principal demand, less the sum taken out of Court (*q*).

(*m*) See *e.g.*, Ionides *v.* Harford (1859), 29 L. J. Ex. 36.

(*n*) See 2 Emerigon, c. xvi. s. 6, p. 201, citing foreign laws and ancient jurists; Stevens, Av. 206. The Code de Commerce provides for the retention of one-half per cent. in certain cases, see arts. 349, 358—361.

(*o*) See Penson *v.* Lee (1800), 2 B. & P. 330.

(*p*) 2 Marshall, Ins. 663; per Chambre, J., in Penson *v.* Lee (1800), 2 B. & P. 333.

(*q*) Carr *v.* Roy. Exch. Ass. Co. (1864), and Carr *v.* Montefiore, 34 L. J. Q. B. 21.

PART IV.

PROCEDURE AND EVIDENCE.

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Commercial Court Procedure.

1269. PREVIOUS editions of this work terminated with several chapters devoted to the subject of Jurisdiction, Procedure and Evidence. There is comparatively little in those chapters of sufficient importance at the present time to justify their retention in this edition. Such questions as who are the proper parties to sue or be sued, and what facts must be proved by a plaintiff or a defendant in order to win his case, have already been dealt with generally in the course of the work; and questions as to the proper form of a declaration or of a plea are no longer of much practical importance (*a*). Cases of marine insurance have, since 1895, been usually tried in what is known as the Commercial Court, where justice is administered without paying a too rigid attention to forms or to technicalities of evidence (*b*).

Consolidation Rule.

1270. Actions on Lloyd's policies are now commonly

(*a*) Forms of statement of claim and defence will be found in Appendices C. (s. 5, No. 6) and D. (s. 5, Nos. 13—15) to the R. S. C. 1883.

(*b*) For a short account of the procedure of this Court, the reader is referred to Scrutton on Charterparties, &c., 4th ed. pp. 304—310.

Sect. 1270. brought against one individual underwriter selected by the plaintiff. Each underwriter is, of course, only severally bound for the amount of his own subscription, and a judgment against one underwriter would not, apart from agreement, or some mode of procedure introduced to meet the case, bind other underwriters who had subscribed the same policy. The assured would, therefore, be entitled to bring a separate action against all the separate underwriters on the same policy, however numerous, in respect of the same loss and the same risk.

As, however, in every policy, regarded as a contract of indemnity, there are substantially but two parties—namely, the assured on one side and the whole body of underwriters on the other; and as the claim to a loss on such policy must generally rest on the same grounds, when preferred against one of the underwriters, as when preferred against another, it is obviously desirable that in actions on policies, as in all other cases, a single trial should decide what is, in fact, but a single question.

Accordingly, in order to secure this result, Lord Mansfield introduced the practice of consolidating actions on policies of insurance (*c*).

At the present day the case is adequately provided for by the Rules of the Supreme Court, 1883 (*d*), which give general powers of consolidating all actions, whether of marine insurance or not, pending in the same Division. In one of the appendices (*e*) to the rules, there is a lengthy form of an order to consolidate actions against underwriters in particular, which form appears to embody in substance the earlier practice. Perhaps the most noticeable feature of the old practice was that inasmuch as the order for consolidation was a favour asked for by the defendants, it was only they who were bound by the result. The plaintiff might if he chose, after a verdict

(*c*) Arnould (2nd ed. p. 1272) here followed with some pages relating to the old practice as to consolidation, which are not considered as of sufficient importance to retain in this edition.

(*d*) Ord. XLIX. r. 8.

(*e*) App. K. No. 60.

for the defendant at the first trial, proceed with one of his other actions. Sect. 1270.

In modern practice, however, the consolidation order is not very much used. The plaintiff usually issues a single writ against one underwriter, and the result, apart from special circumstances, is treated by all parties as concluding the matter.

Order for ship's papers.

1271. There is one important point of practice which is peculiar to actions on policies of marine insurance; this is the practice whereby the underwriter is entitled, as a matter of course, to an order against the assured, requiring the latter to discover on oath, and to produce, all the ship's papers. This practice appears to have been introduced about a century ago, at a time when the Courts of Common Law were unable to grant discovery, in order to relieve the underwriter of the necessity of going to a court of equity (*f*). Further reasons for the practice are that "the underwriters have no means of knowing how a loss was caused; it occurs abroad and when the ship is entirely under the control of the assured. In addition to this the contract of insurance is made, in peculiar terms, on behalf of the assured himself and all persons interested, and who these persons are, especially at the time of the loss, is entirely unknown to the underwriters" (*g*). Nor was the practice of making the order on all parties interested, without an affidavit, altered by the Judicature Acts (*h*).

The order is very comprehensive in form and runs as follows (*i*):—"It is ordered that the plaintiff and all persons interested in these proceedings and in the insurance, the subject of this action, do produce and show to the defendant, his solicitors or agents, upon oath, all insurance slips, policies, letters, or instruction, or other orders for effecting such slips

(*f*) See Goldschmidt *v.* Marryat (1809), 1 Camp. at p. 562, per Mansfield, C. J.

(*g*) Per Brett, L. J., in China S.S. Co. *v.* Commercial Ass. Co. (1881), 8 Q. B. D. at p. 145.

(*h*) *Ibid.*; and see also West of England Bank *v.* Canton Ins. Co. (1877), 2 Ex. D. 472.

(*i*) App. K. to R. S. C. 1883, No. 19.

SECT. XXII. [illegible] and also all documents relating to the [illegible] and all letters and correspondence with any person or persons in any manner relating to the [illegible] and also all documents relating to the [illegible] and all letters and correspondence with any person or persons in any manner relating to the insurance of the said ship, the cargo or freight thereof, or the [illegible] and also all documents relating to the [illegible] and all letters and correspondence with any person or persons in any manner relating to the insurance of the said ship, the cargo or freight thereof, or any other interest whatever effected on the said ship, or the cargo or freight thereof, or the freight thereby on the voyage insured by or relating to the policy sued upon in this action, or any other policy whatsoever effected on the said ship, or the cargo or freight thereof, or the freight thereby on the same voyage. And all correspondence between the captain or agent of the vessel and any other person, with the owner or any person or persons previous to the commencement of or during the voyage upon which the alleged loss happened. Also all protests, surveys, log books, charter-parties, tradesmen's bills for repairs, average statements, letters, invoices, bills of parcels, bills of lading, manifests, accounts, accounts-current, accounts-sales, bills of exchange, receipts, vouchers, books, documents, correspondence papers, and writings (whether originals, duplicates, or copies respectively), which now are in the custody, possession, or power, of the said plaintiff and the said other persons as aforesaid, his, or their, or any or either of their brokers, solicitors, or agents, in any way relating or referring to the matters in question in this action, with liberty for the defendant, his solicitors, or agents to inspect and take copies of or extracts from the same or any, or either of them, and that in the like manner the plaintiff and the said other persons as aforesaid do account for all such documents as were once, but are not now, in his, their, or any or either of their possession, custody, or power, and that in the meantime all further proceedings be stayed, and that the costs of and occasioned by this application be ."

1272. It will be observed that this order is much more

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Stringent nature of the order.

stringent than the common order for discovery made in an ordinary action, which only embraces such documents relating to the matters in question in the action as are or have been in the possession or power of the party. From the observations above cited of Brett, L. J. (*k*), it might have been inferred that the order would only be made against a shipowner, with the object of obtaining from him information of which he alone was possessed. But the terms of the order and the decisions thereon go far beyond such a limitation. Thus, it was held that the order was properly made against mortgagees who had never sailed or been in possession of the vessel, and that it was not a sufficient compliance with the order for them to swear that they had no papers (*l*). The position was thus explained by Cleasby, B.:—"The interest of the plaintiffs is that of bare mortgagees. They have nothing to do with the sailing of the ship, they merely have an interest in the ship itself. The ship is lost; they bring this action. Is the underwriter entitled to call upon them not only to make an affidavit and to produce that which they have—which is nothing, from their interest being such as I have mentioned—but to cause these papers to be produced upon affidavit by the mortgagor, who, by permission of the mortgagee has sailed the ship, and who, I assume, would be the person in possession of all the ship's papers? I do not say that the mortgagees would be *bound* to produce through the mortgagor all those papers—we do not decide that—but at all events, they cannot say: 'We will do no more than make an affidavit that we have no papers ourselves, or none under our actual control.' No; they must go further, and endeavour to comply with the practice in substance, that is to say, they must endeavour to produce the ship's papers; they must satisfy us that they have made application to the mortgagor and have done what they can to place the defendant

Made against mortgagees.

(*k*) See also per Cockburn, C. J., in Rayner *v.* Ritson (1866), 35 L. J. Q. B. at p. 61,

(*l*) West of England Bank *v.* Canton Ins. Co. (1877), L. R. 2 Ex. D. 472.

Sect. 1272. in the position of knowing what his defence to the action is" (*m*).

Owner of goods and re-assured.

Similarly, the order is made against a plaintiff claiming on a policy on goods (*n*), and against an underwriter suing upon a policy of re-insurance (*o*).

It is to be observed that the order will only be made where the case is really one of marine insurance. It has been refused where the transit covered was partly by sea and partly by land (*p*).

Who can sue?

1273. Questions as to who are competent and proper parties to avail themselves of policies have already been sufficiently discussed (*q*). Speaking generally, persons in whose interest a policy has been effected, or to whom the policy has been properly assigned, can sue thereon, as well as the nominal assured.

Province of the jury.

Questions sometimes arise, in cases of marine insurance, as to the respective provinces of judge and jury. It is within the province of the jury to determine questions of fact relating to the existence of mercantile usage, and to the use and meaning of mercantile terms. The customs of merchants,

Usages.

and the general and known usages of trade, when they have been ascertained and determined by a course of judicial decision, form part of the law merchant, and as such are thenceforward judicially noticed by the Courts (*r*).

The usages, however of a particular trade (*s*), or of a par-

(*m*) Per Cleasby, B., L. R. 2 Ex. D. at p. 474. The judgments of the Court of Appeal in China SS. Co. *v.* Commercial Ass. Co., *ubi supra*, are to the same effect. For an instance where the Court was not satisfied that the plaintiffs had done their best to obtain papers, see London & Provincial Co. *v.* Chambers (1900), 5 Com. Cas. 241.

(*n*) See per A. L. Smith and Chitty, L. JJ., in the case next cited.

(*o*) China Traders' Co. *v.* Royal Exch. Ass. Corp., [1898] 2 Q. B. 187; overruling two recent Divisional Court decisions to a contrary effect.

(*p*) Henderson *v.* The Underwriting, &c. Assoc., [1891] 1 Q. B. 557; Village Main Reef Co. *v.* Stearns (1900), 5 Com. Cas. 246.

(*q*) See Part I. Chap. VIII. on Description of Assured in the Policy, &c.

(*r*) Barnett *v.* Brandao (1843), 6 M. & Gr. 630.

(*s*) Pelly *v.* Royal Exch. Ass. Co. (1757), 1 Burr. 341; Noble *v.* Kennoway (1780), 2 Dougl. 510; Milward *v.* Hibbert (1842), 3 Q. B. 120,

ticular place, as the usages at Lloyd's (*t*), must be proved by parol evidence to the satisfaction of the jury; and whether the parties to the contract must, from their place of residence, habits of business, or other circumstances, be taken to be cognisant of the usage at Lloyd's, is also a question for the jury (*u*), according to whose finding thereon the Courts hold the parties bound or not bound by the usage. It is, however, in all cases for the Court to decide whether evidence of usage be admissible. Sect. 1273.

1274. The construction of the policy, when the meaning of its terms is ascertained, is for the Court; but the interpretation to be put upon technical terms (*v*), the extension given by mercantile usage to descriptions of ports or places named in the policy (*x*), and the construction of peculiar, novel, or unusual clauses by received practice or known usage (*y*), is for the jury. In these cases it is for the jury to say what the meaning of the expression is, but for the Court to decide what the meaning of the contract is (*z*). Terms of trade.

The question of the materiality of a representation (*a*) or concealment (*b*) is for the jury, though the Judge in such cases ought to take care that they are not misled by anything that comes out in the evidence (*c*). The question whether a given ship be out of time on a given voyage seems exclusively a question for the jury (*d*). Materiality of representation and concealment.

(*t*) Gabay *v.* Lloyd (1825), 3 B. & Cr. 793; Lawrence *v.* Aberdein (1821), 5 B. & Ald. 107.

(*u*) Stewart *v.* Aberdein (1838), 4 M. & W. 211; Sweeting *v.* Pearce (1861), 7 C. B. N. S. 449; 9 *ibid.* 534.

(*v*) Houghton *v.* Gilbart (1836), 7 C. & P. 701.

(*x*) Constable *v.* Noble (1810), 2 Taunt. 403; Cockey *v.* Atkinson (1819), 2 B. & Ald. 460; Robertson *v.* Clarke (1824), 1 Bing. 445; Moxon *v.* Atkins (1812), 3 Camp. 200.

(*y*) Parr *v.* Anderson (1805), 6 East, 202, 207.

(*z*) Per Parke, B., in Hutchinson *v.* Bowker (1839), 5 M. & W. 542.

(*a*) M'Dowall *v.* Fraser (1779), 1 Dougl. 260; Mackintosh *v.* Marshall (1843), 11 M. & W. 121; Duer, Representations, 78, 196.

(*b*) Littledale *v.* Dixon (1805), 1 B. & P. N. R. 151; Rawlins *v.* Desborough (1840), 2 Mood. & Rob. 328 Westbury *v.* Aberdein (1837), 2 M. & W. 267.

(*c*) Mackintosh *v.* Marshall (1843), 11 M. & W. 126.

(*d*) Littledale *v.* Dixon (1805), 1 B. & P. N. R. 151.

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Deviation.

In cases of deviation the question as to what is the usual or prescribed course of the voyage insured is, generally speaking, for the jury, and is to be made out by the evidence of mercantile men. When so ascertained, the question whether, upon the whole construction of the policy and under all the circumstances of the case, there has been what amounts to a deviation, is for the Court (e). It is for the jury to say whether a given voyage has been commenced or prosecuted within a reasonable time (f).

Delay.

Seaworthiness.

The question whether the ship was seaworthy when she sailed is for the jury; and whether anything has been done to dispense with the obligation of the implied warranty is for the Court (g).

Illegality.

In cases of alleged illegality for violating the laws of blockade, the question whether actual notice of a blockade has reached the captain is for the jury (h); whether he is to be presumed in law to have had notice in consequence of a certain public notification by the government is for the Court (i); but whether the captain was endeavouring to break the blockade when taken is a question for the jury (k).

Extent of interest intended to be insured.

When the question turns upon the extent to which the plaintiff is entitled to recover in respect of his interest, the jury may be asked whether, in procuring the policy to be effected, he intended to protect his own interest only, or that also of other parties not named on the record, but having an interest in the subject of insurance (l).

Constructive total loss.

In determining whether the loss on a wreck or stranded ship is constructively total, the question whether the case was

(e) So Arnould, 2nd ed. p. 1307, *sed quære.*

(f) Mount *v.* Larkins (1831), 8 Bing. 108. See also Phillips *v.* Irving (1844), 7 M. & Gr. 325.

(g) So Arnould, 2nd ed. p. 1307, citing Weir *v.* Aberdein (1819), 2 B. & Ald. 320.

(h) Harratt *v.* Wise (1829), Dans. & Ll. 234; Winder *v.* Wise (1829), *ibid.* 238.

(i) Naylor *v.* Taylor (1829), Dans. & Ll. 240.

(k) *Ibid.*

(l) Carruthers *v.* Sheddon (1815), 6 Taunt. 14; Irving *v.* Richardson (1831), 2 B. & Ad. 193; Scott *v.* Globe Mar. Ins. Co. (1896), 1 Com. Cas. 370. "I have to ascertain as matter of fact the risk intended to be covered," per Mathew, J.

one for abandonment rather than repair is for the jury. Whether notice of abandonment has been given in due time is a question for the Court (*m*). Sect. 1274.

In actions against policy brokers and other agents for negligence, questions as to reasonable skill and care, due diligence, and gross negligence must, generally speaking, be decided by the jury (*n*). Reasonable skill and care.

1275. The rules of evidence applicable to policies of insurance do not differ from those which prevail in other cases. Questions of the burden of proof and the sufficiency of the evidence have to a great extent been considered in the course of this work; but the following remarks, reproduced chiefly from previous editions, may be of some use to the practitioner. Sufficiency of proof.

The allegation that the policy was effected by the nominal assured as agent for the party interested, under the provisions of the statute 28 Geo. 3, c. 56, must be substantially proved as laid. Proof of the making of the policy.

In the leading case on this subject, the allegation that the policy was effected by the plaintiffs as agents for one Lund, and for his use and benefit, was held to be sustained by proof that plaintiffs had effected the policy as general agents for Lund and consignees of the bill of lading; and that Lund, after being informed of their having effected the policy on his behalf, had written to approve of their having done so (*o*). Proof of agency for assured.

The main principle acted upon in this case, and illustrated more or less by most of the subsequent decisions on the point, is that subsequent ratification of the insurance by the principal on whose behalf it is effected, is equivalent to a prior order on his part to insure—*omnis ratihabitio retrotrahitur, et mandato æquiparatur* (*p*). Ratification.

(*m*) Kemp *v.* Halliday (1866), 34 L. J. Q. B. 233; King *v.* Walker (1864), 3 H. & C. 209; Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. 467.

(*n*) See *ante*, Part I. Chap. VII.

(*o*) Wolff *v.* Horncastle (1798), 1 B. & P. 316.

(*p*) Lucena *v.* Craufurd (1808), 3 B. & P. N. R. 269; *S. C.* on *venire de novo*, 1 Taunt. 325; Routh *v.* Thompson (1811), 13 East, 274; Routh *v.* Thompson (1809), 11 East,

Sect. 1275. In one of these cases, where the action was brought by the foreign principal, on a policy effected in the name of an insurance broker, in the common form, Lord Ellenborough held that the production of a letter, directing the insurance, written to the broker by the plaintiff from abroad with the English ship-letter post-mark upon it, and the date of the year in which the policy was effected, was sufficient proof of an averment in the declaration, that such broker was "the person residing in Great Britain who received the order for and effected the policy" (*q*).

After verdict, it will be intended that sufficient proof has been given that the plaintiffs effected the policy as agents for the party really interested, or gave the order for insurance, or in some way or other brought themselves within some one of the descriptions of the 28 Geo. 3, c. 56. Lord Ellenborough, therefore, refused to arrest judgment in an action on a policy, though it appeared on the face of the declaration that the plaintiffs on the record were neither the persons named in the policy nor the parties interested (*r*).

Agency for insurer. Proof of subscription of the policy.

1276. Unless admitted, as is very generally the case, the subscription of the policy must be proved in the usual way. Where the underwriter's signature has actually been written by himself, no difficulty can arise; where, however, as not unfrequently occurs, the policy has been subscribed by an agent on his behalf, a question may arise as to the authority of the agent. As to this, proof that the agent had often subscribed policies in defendant's name, and that the defendant had held him out to the world as properly authorized for that purpose, was held by Lord Kenyon sufficient evidence of an authority to sign, without proof of any written authority so to do (*s*). Lord Ellenborough, in one case, seems to

428; Bell *v.* Janson (1813), 1 M. & S. 201; Hagedorn *v.* Oliverson (1814), 2 M. & S. 485; Williams *v.* North China Ins. Co. (1876), 1 C. P. D. 757.

(*q*) Arcangelo *v.* Thompson (1811), 2 Camp. 620. See further as to evidence of ratification, and as to what amounts to ratification, *ante*, ss. 140—143.

(*r*) Mellish *v.* Bell (1812), 15 East, 4.

(*s*) Neal *v.* Irving (1793), 1 Esp. 61.

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have thought this proof not sufficient (*t*); but admitted it to be so in another, when coupled with the additional fact that the defendant had been in the habit of paying losses on policies so subscribed (*u*). Proof that the agent of an insurance company was in the habit of signing other memoranda of a similar nature, was held sufficient proof of his authority to sign a memorandum for a change of voyage indorsed on the policy (*x*).

It is, it seems, to be presumed that an agent who has authority to subscribe a policy has also authority to settle a loss (*y*).

Proof of subscription by an authorized agent will satisfy an allegation of signature by the defendant (*z*).

The private limitations on the authority of the insurer's agent to underwrite are binding on the assured, notwithstanding his ignorance of the limits, if it appear in evidence to be notorious that all similar agents in the same locality are limited in their authority (*a*).

When copy of alleged policy can be put in.

1277. The assured, in order to prove the policy, produced in evidence what purported to be a copy received from the defendant's broker. It was objected on the part of the defendant that this was inadmissible in evidence, because a stamped original never had existed, and interlocutory evidence to that effect was offered on the instant. But the Judge refused to determine that question in the way of an interlocutory point, as it went to the whole cause of action; he admitted the copy, received the evidence on the part of the defendant in its own order, and submitted the point as one

(*t*) Courteen *v.* Touse (1807), 1 Camp. 43.

(*u*) Haughton *v.* Ewbank (1814), 4 Camp. 88.

(*x*) Brockelbank *v.* Sugrue (1831), 5 C. & P. 21. See further as to the due execution of an authority to sign policies, Guthrie *v.* Armstrong (1822), 1 Dowl. & Ryl. 248; Mead *v.* Davison (1835), 3 A. & E. 303.

(*y*) Richardson *v.* Anderson (1807), 1 Camp. 43, n.; and per Blackburn, J., Xenos *v.* Wickham (1863), 33 L. J. C. P. 13—19.

(*z*) Nicholson *v.* Croft (1761), 2 Burr. 1188. See also Cope *v.* Miller (1896), 1 Com. Cas. 296.

(*a*) Baines *v.* Ewing (1866), L. R 1 Exch. 320.

Book 2nd. ...of the premises in the hand of the party. The Court in Banc approved of this course as right.

Proof of compliance with warranty

Lastly, it was held that compliance by the plaintiff with all express warranties "being conditions precedent in the policy's favour," must be proved by him as part of his case. This is probably true enough, if it should whether it is correct to speak of all warranties as "conditions precedent in the policy's favour" (*a*). It is clear however that the onus of proving non-compliance is upon the underwriter (*b*), and it is not easy to see why in this respect there should be a distinction between warranties express and implied.

Proof of ownership of ship

1275. Under the Merchant Shipping Act, 1854 (*c*), the register and certificate of registry of a ship are evidence of the facts stated therein and all matters, by law required or authorized to be inserted therein, and are to prove interest in the ship. Upon a policy on ship the possession of the assured as owner is also *prima facie* evidence of property, but a contrary of that fact, supported by evidence, may render it necessary for the assured to prove additional facts. When the parties to an action were not allowed to give evidence, the proof of ownership was of course more difficult than it is now. Where it was proved by the captain that the assured were the persons by whom, as owners, he was appointed and employed—this was held to be sufficient *prima facie* evidence of ownership; and though it afterwards appeared, by his answers on cross-examination, that the ownership was derived to the assured under a bill of sale executed by himself as attorney to the former owner, it was further held that it did not on this account become necessary to produce the bill of sale or the ship's register, or to give any further

(*b*) Stowe v. Querner (1870), L. R. 5 Exch. 155. See Stamp Act, 1891, s. 97 (2).

(*a*) 2nd ed. p. 1310, citing Arcangelo v. Thompson (1811), 2 Camp. 620; D'Israeli v. Jowett (1796), 1 Esp. 427; Watson v. King (1815), 4 Camp. 272.

(*d*) See *ante*, s. 634.

(*e*) Pickup v. Thames Ins. Co. (1878), 3 Q. B. D. 594.

(*f*) Sects. 64, 695, reproducing in effect sect. 107 of the Merchant Shipping Act, 1854.

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proof of property beyond the mere fact of ownership, no contrary proof having been adduced on the other side (*g*). To the same effect it was ruled by Lord Kenyon, that evidence of the assured having exercised acts of ownership in directing the loading, &c., of the ship and paying the people employed, was sufficient proof of interest (*h*); and by Lord Ellenborough, that evidence that the party in whom interest was averred had ordered and paid for stores, &c., was sufficient *primâ facie* proof of his ownership, though it came out on cross-examination that he had derived his title under a bill of sale which was not produced (*i*).

Agent cannot deny his principal.

An agent, after accounting with his principals and receiving money in that capacity, cannot dispute their title, and say that he did not receive the money for them, but for some other person. Hence, where a broker, after having become sole registered owner of a ship which had been previously owned by one of two parties, effected an insurance on the partnership account, and accounted with the partnership for the premiums, it was held that he could not set up his title on the register as a defence to an action for money had and received, brought by the partnership to recover the amount of a loss which had been paid by the underwriter to him, as the agent of both partners (*j*).

Proof of insurable interest in freight.

The question of insurable interest in freight has already been so fully considered (*k*) that it is unnecessary to say anything more as to the facts which must be proved to establish such an interest.

Proof of insurable interest in goods.

1279. Interest in goods is proved either as in the case of ship by evidence of possession or of acts of ownership; or by transfer of title to the assured under bill of lading or other document; or by evidence of payment of the price or of a contract under which the property has passed.

(*g*) Robertson *v.* French (1803), 4 East, 130.

(*h*) Amery *v.* Rodgers (1794), 1 Esp. 208.

(*i*) Thomas *v.* Foyle (1803), 5 Esp. 88.

(*j*) Dixon *v.* Hamond (1819), 2 B. & Ald. 310. See Hickie *v.* Rodocanachi (1859), 4 H. & N. 455.

(*k*) *Ante*, ss. 262—279.

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Bill of lading. The bill of lading is the usual evidence of the ownership of property shipped, the consignee or his assignee being presumed to be the owner where it is not otherwise expressed in the bill of lading (*l*). It must be remembered that, even against the shipowner, the bill of lading is not more than *primâ facie* evidence of the shipment of the goods (*m*). In an action on the policy, being merely an acknowledgment by the master, it is no evidence without authentication and some proof that the goods specified in it were actually shipped on board (*n*). If it be subscribed "contents unknown," it has been held that such bill of lading is not evidence either of the quantity of the goods, or of the insurable interest of the consignee (*o*). It is, however, submitted that such bill of lading is *primâ facie* evidence that the property in the packages mentioned therein, and in whatever may be proved to be their contents, is in the holder of the bill.

Payment of price of goods. Payment of price of the goods is satisfactory evidence of insurable interest; hence a bill of parcels, with the vendor's receipt, for goods sold abroad, was very early held to be sufficient proof of interest (*p*); so the fact that consignees have given their acceptance to the consignors for the price, and on account, of the goods, especially if coupled with proof of payment, would, it seems, be satisfactory evidence (*q*).

(*l*) Hibbert *v.* Carter (1787), 1 T. R. 745; Caldwell *v.* Ball (1786), 1 T. R. 205. See *ante*, s. 292.

(*m*) All that is done by the Bills of Lading Act is to make this acknowledgment conclusive against "the master or other person signing the same:" 18 & 19 Vict. c. 111, s. 3. See Grant *v.* Norway (1851), 10 C. B. 665; Maclean *v.* Fleming (1871), L. R. 2 H. L. (Sc.) 128; and the other cases cited, Carver, s. 69.

(*n*) M'Andrew *v.* Bell (1795), 1 Esp. 373; Dickson *v.* Lodge (1816), 1 Stark. 226.

(*o*) Haddow *v.* Parry (1810), 3 Taunt. 303. The captain who signed the bill of lading was dead, and Sir James Mansfield seems to have thought at the trial that it could not be used at the trial as an admission, on proof of the handwriting of the deceased. On the argument of the rule for a new trial, however, Lawrence, J., seemed to think that the bill of lading, without the limiting words, would have been evidence that the goods had been received on board. It is submitted that the view of Lawrence, J., is the correct one.

(*p*) Russel *v.* Boehm (1740), 2 Str. 1127.

(*q*) See Davies *v.* Reynolds (1815), 1 Stark. 115.

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To prove that the goods insured were shipped, a clerk in the custom-house produced the copy of an official paper, containing an account of the cargo as examined by the searcher; the official paper goes with the ship, and the copy is kept at the custom-house. Chambre, J., ruled this copy to be admissible without calling the searcher, as being a paper made by the appointed officer under the authority of an Act of Parliament, and lodged as an official document in the custom-house (*r*).

Documents kept at the custom-house.

In an action upon a policy on bottomry and respondentia loans, evidence of the execution of the bond, and of the interest of the borrower in the ship or goods, is sufficient proof of the interest of the assured, and the borrower himself was, even before Lord Denman's Act, and *à fortiori* would be so now, a competent witness to prove his own interest in the ship or goods, by hypothecating which he raised the loan (*s*).

Proof of insurable interest in bottomry.

But in a policy on goods a respondentia bond is no proof of interest in the goods on which the money was borrowed (*t*); though by the usage of the East India trade, proof of money laid out by the captain in the course of the voyage, and for which he charged respondentia interest, was held to be proof of insurable interest in a policy "on goods, specie, and effects" (*u*).

Respondentia bond no proof of interest in goods, except by usage.

1280. Under a general averment of interest in the entire thing insured, the plaintiff may prove an interest in part, and recover *pro tanto;* thus, where one of four part owners of a ship insured her freight generally in an open policy, and averred his interest generally, without specifying it to be in only an aliquot part of the freight, it was held that he might recover in proportion to the amount of interest he proved (*x*). So, *à fortiori*, if the plaintiff prove a greater interest than he has alleged in his claim, this shall not pre-

Amount of interest.

(*r*) Johnson *v.* Ward (1806), 6 Esp. 47.

(*s*) Glover *v.* Black (1762), 1 W. Bl. 396.

(*t*) Glover *v.* Black (1762), 3 Burr. 1394; 1 W. Bl. 405, 422.

(*u*) Gregory *v.* Christie (1785), 3 Dougl. 419.

(*x*) Rising *v.* Burnett (1798), 2 Marsh. Ins. 738.

Sect. 1280. clude him from recovering to the extent of the interest he has alleged (*y*).

Where a plaintiff, only interested in one-fourth of a ship, declared for a total loss of the entire ship and proved only a partial loss, he was held entitled to recover in proportion to the partial loss on his fourth (*z*).

Inception of risk.

1281. As we have elsewhere seen, before a loss can be recovered from the underwriter, it must be shown to have taken place within the period or local limits of the risk or voyage insured. Hence the fact that the ship was at the port, or had sailed on the voyage, or that the goods were loaded on board, before the loss, must be substantially proved as laid. This may be done by the testimony of the master or other officer acquainted with the circumstances, or by means of written directions transmitted to the master, or by licences, charter-parties, entrances, clearances, convoy bonds, &c., preparatory to the departure of the ship, and indicating her destination (*a*).

On ship.

It must be proved that the ship had sailed on the voyage insured, or if the loss should take place "at" the port where the risk is made to commence, then that the ship was at such port on the voyage insured (*b*). Where the ship has foundered at sea, this proof of her having sailed on the voyage insured has sometimes presented difficulty. The following points have been decided as to the sufficiency of the evidence. To prove that a ship, insured at and from Portsmouth to Quebec, had sailed for the latter place, a witness was called who stated that he had seen the ship in Stokes Bay going out with the other ships from Spithead, and that she had never since been heard of. Lord Ellenborough held this insufficient. The convoy bond from the custom-house was then produced, with these words at the bottom of it—"convoy

Production of convoy bond.

(*y*) Page *v.* Rogers (1786), 2 Marsh. Ins. 739.

(*z*) Gardiner *v.* Crosadale (1760), 2 Burr. 904; 1 W. Bl. 198.

(*a*) Stark. Evidence, vol. iii. p. 873, 3rd ed.

(*b*) Cohen *v.* Hinckley (1809), 2 Camp. 51.

bond for Quebec"; and an officer from the customs said that it was in the course of office to write these words on the bond, and that though he did not know of any act of office being done on it, yet he had no doubt that the papers, for a voyage to Quebec, were delivered to the captain before sailing. Lord Ellenborough held this good *primâ facie* evidence that the ship had sailed on the voyage insured (*c*). In the same case Lord Ellenborough said that if it could be shown that the ship had a particular destination by charter-party, he should presume that she sailed on the chartered voyage; so, on proof that she had cleared out for a particular port, the presumption would be that she had sailed for it when she dropped from her moorings (*d*). A licence to carry a cargo to a place named in the policy as the port of destination, is *primâ facie* evidence that the ship, when she left her port of outfit, sailed on the voyage insured (*e*).

Sect. 1281.

Of charter-party, or clearances.

Of licence.

In order to prove, under a policy on goods, that the ship had sailed on a voyage from Leghorn to Lisbon, the plaintiff called a packer, resident in Leghorn, who stated that he had packed the goods at the warehouse of the shipper, and by his orders delivered them to a boatman, to go by the ship; the boatman was also called, who stated that he, by the shipper's orders, had delivered them on board the ship and taken a receipt for them from the captain, whom he knew, and that he had heard, both from the shipper and the captain, that the vessel was bound for Lisbon. Abbott, C. J., held that this was not even *primâ facie* evidence that the ship ever sailed for Lisbon (*f*).

What is insufficient evidence for this purpose.

Where the averment was that the ship sailed after the making of the policy, and the proof was that she sailed before, the variance was held to be immaterial (*g*). A ship-

Time of sailing.

(*c*) Cohen *v.* Hinckley (1809), 2 Camp. 51.
(*d*) *Ibid.* 52.
(*e*) Marshall *v.* Parker (1809), 2 Camp. 69.
(*f*) Koster *v.* Innes (1825), Ry. & Mood. 333.
(*g*) Peppin *v.* Solomons (1794), 5 T. R. 496.

Sect. 1281. ping entry at the custom-house has been admitted to show the time of the ship's sailing *(g)*.

On goods.

1282. In case of goods, the loading of them on board must be properly proved, and for this purpose the bill of lading is usually produced. There must be direct testimony of the actual shipment of the goods. Proof also must be given that the goods were within the period of the risk, or the limits of the voyage insured. This where it appeared that the ship, after being turned away from her port of destination, sailed in another place not protected by the policy, and no proof was given whether the damage sustained by the goods had occurred in the first or the second of these two voyages, Lord Ellenborough directed a nonsuit on the ground that there was no distinct evidence that the goods were injured while protected by the policy *(h)*.

Loss in goods occurred out of the risk or voyage insured.

On freight.

With regard to freight, the question when there is an inception of the risk has been fully considered *(i)*. If the plaintiff relies on a contract to ship the goods on freight, he must be prepared to show that such contract is legally binding *(j)*, though it need not be written or under seal *(k)*, and also that the perils insured against prevented freight being earned *(l)*.

Proof of loss.

1283. Direct proof of the fact of loss may be, and in most cases is, given by the parol testimony of the master, officers, or some of the crew of the ship. It may also be proved by other legal evidence. The condemnation of a foreign Court of Prize is not evidence to prove a capture in fact, though, after such proof has been given, it is evidence of the grounds of condemnation *(o)*.

(h) Hughes *v.* Wilson (1816), 1 Stark. 180.

(i) *Ante*, s. 1279.

(j) Parkin *v.* Tunno (1809), 2 Camp. 69.

(k) *Ante*, ss. 510—519.

(l) Patrick *v.* Eames (1813), 3 Camp. 441.

(m) Flint *v.* Flemyng (1830), 1 B. & Ad. 48.

(n) For a full discussion of the question of the commencement of the risk on ship, goods, or freight, see *ante*, Part I. Chap. XVII.

(o) Marshall *v.* Parker (1809), 2 Camp. 69. In one case Le Blanc, J.,

Sect. 1283.

The protest of the captain cannot be put in evidence for the shipowner, but if produced against him by the other side, it thereupon becomes evidence for the ship also.

Proof of confiscation.

In one case Lord Ellenborough ruled that, in order to prove a confiscation, it was not necessary to show that the proceeds of the goods seized actually came into the treasury of the State, but that it was enough to show that they were forcibly taken possession of by the officers of government (*p*).

Presumptive proof of loss.

We have already sufficiently considered what will amount to presumptive proof of loss by foundering, and need not here repeat the points decided on that head (*q*). It may be added that in some cases it may be advisable to be provided with evidence of any collateral circumstance that may tend to support the presumption, as, that other vessels which sailed at the same time did actually arrive (*r*), the usual length of the voyage, the difficulty of navigation, the prevalence of tempestuous weather, &c. It has been held sufficient to establish a presumption of the loss of a ship on the voyage, for the shipowners to prove that they had not heard of her arrival; it is not necessary to call witnesses from the port of destination to prove that the ship never arrived there (*s*).

Assured who claims for a total may recover for a partial loss.

1284. It is clearly settled that the assured may recover for a partial although he has declared for a total loss (*t*); indeed, this is matter of common form. He may, as we have already seen, recover for loss by salvage, although it be not specifically alleged by him as a loss (*u*); but if it be salvage which he has been obliged to pay to recaptors, he cannot recover the amount unless he produces and proves the proceedings in the Admiralty Court; for the extent of his claim

is reported to have ruled that the fact of capture might be proved by the production of Lloyd's book, in which it was mentioned: Abel *v.* Potts (1800), 3 Esp. 242, *sed quære.*

(*p*) Carruthers *v.* Gray (1811), 3 Camp. 142.

(*q*) *Ante*, Part III. Chap. II.

(*r*) Newby *v.* Read (1762), 1 Park, Ins. 148.

(*s*) Twemlow *v.* Oswin (1809), 2 Camp. 85.

(*t*) Gardner *v.* Croasdale (1760), 2 Burr. 904; King *v.* Walker (1863), 2 H. & C. 384; 3 *ibid.* 209.

(*u*) Cary *v.* King (1736), Ca. temp. Hardw. 304.

Sect. 1284. depends on the judgment of that Court *x*. Where the assured on ship, who had claimed a total, but was only entitled to an average, loss, merely proved that his ship had sustained some damage, but gave no evidence as to its extent, Lord Tenterden directed the jury to find a verdict for the plaintiff, with nominal damages only *y*.

Mercantile interest.

By the Common Law no interest was recoverable on the amount of loss, except in cases where the assured had, before the trial, made application to the underwriter for the amount, and notified to him the ground of his application *z*. Now, however, by the 3 & 4 Will. 4, c. 42, s. 29, juries may, if they think fit, give damages in the nature of interest, over and above the money recoverable, in all actions on policies of insurance made after the passing of the Act.

Interest on bottomry loans.

In regard to interest on bottomry loans, it has been laid down by Story, J., that the sum lent and the bottomry interest are to be considered as an aggregate debt from the time the bond becomes due by the successful termination of the voyage, and that, consequently, from such time common interest is to be allowed on the aggregate amount (*a*); and such, it seems, would now be the law in this country, as it is not to be supposed that the old maxim *accessio accessionis non est* (*b*) would in the present day have any weight with our Courts.

Burden of proof under plea of misrepresentation.

1285. Proof of misrepresentation will generally comprise the following facts:—1. That the representation was made; 2. That it was material; 3. That it was untrue. In order to prove the first point, recourse may be had to the party to whom the representation was made, or to others who heard it; its materiality is a question for the jury, and will generally be

(*x*) Thellusson *v.* Shedden (1806), 2 B. & P. N. R. 228.

(*y*) Tanner *v.* Bennett (1825), Ry. & Mood. 182. Failure to prove losses amounting to 3 or 5 per cent. might, by virtue of the memorandum, disentitle the plaintiff to even nominal damages. See 2 Phillips, 2144.

(*z*) Bain *v.* Case (1829), 3 C. & P. 496. See Kingston *v.* M'Intosh (1808), 1 Camp. 518; Higgins *v.* Sargent (1823), 2 B. & Cr. 348.

(*a*) The Ship Packet (1823), 3 Mason, 255.

(*b*) 2 Marshall, Ins. 759.

made out by the nature of the statement itself. The proof of the third point will depend upon, and be readily suggested by, the facts of the case. Sect. 1285.

Proof of illegality is on defendant.

Illegality is never presumed, but must always be proved in the first instance by the party who relies on it as a defence. Thus, whenever the defence turned on non-compliance with the Convoy Acts, Lord Ellenborough held that the burden of proof lay on the underwriters to make out, in the first instance, how the Acts had been violated (*c*). So, where an insurance was made to a port or ports within a certain territory, where some of the ports were neutral and others hostile, it was held that the presumption was that the ship was destined to one of the neutral ports (*d*).

Constructive total loss.

It is upon the assured to show, in a case of alleged constructive total loss, that the circumstances attending the insured property were such as justified the notice of abandonment. It is upon the underwriter to show that this state of circumstances has not continued down to the time of action brought, so as to reduce the plaintiff's claim to an average loss. In a case of wrongful taking at sea and condemnation as a slaver by the Vice-Admiralty Court of St. Helena, Lord Campbell says: "As from the wrongful seizure and notice of abandonment, the loss was at one time to be regarded as total; the onus seems to be cast upon the underwriter of showing that by subsequent events it ceased to be so. And if before action brought the goods had been restored to the assured, or he had the means of getting possession of them under such circumstances as ought to have induced a prudent man to take possession of them, his claim could now only have been for a partial loss. But the mere existence of the ship or goods insured, after a total loss and abandonment, so that possession of them may possibly be resumed by the owner, will not reduce it to a partial loss. The true rule seems to us to be

(*c*) Thornton *v.* Lance (1815), 4 Camp. 231; D'Aguilar *v.* Tobin (1816), Holt, 185; 2 Marsh. R. 265.

(*d*) Anon., 1 Chit. R. 49. See Hobbs *v.* Henning (1865), 34 L. J. C. P. 117.

[illegible] [illegible] [illegible] possession, and may [illegible] be exposed [illegible] possession [illegible]

[illegible] v. W[illegible]

[illegible]

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APPENDIX A.

19 Geo. 2, c. 37.

An Act to regulate Insurance on Ships belonging to the Subjects of Great Britain, and on Merchandizes or Effects laden thereon.

Whereas it hath been found by experience, that the making assurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy, in time of war; and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the parties concerned secured from loss, as well to the diminution of the publick revenue, as to the great detriment of fair traders; and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risque on shipping, and fair trade, the institution and laudable design of making assurances, hath been perverted; and that which was intended for the encouragement of trade and navigation, has, in many instances, become hurtful of, and destructive to the same: for remedy whereof be it enacted that no assurance Preamble

Appendix A.

No assurance to be made on ships or effects, &c., interest or no interest;

or assurances shall be made by any person or persons, bodies corporate or politick, on any ship or ships belonging to his Majesty or any of his subjects, or on any goods, merchandizes or effects laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes.

Except on private ships of war;

2. Provided always, that assurance on private ships of war, fitted out by any of his Majesty's subjects solely to cruise against His Majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer; anything herein contained to the contrary thereof in anywise notwithstanding.

and on effects from Spain or Portugal.

3. Provided also, that any merchandizes or effects from any ports or places in Europe or America, in the possession of the crowns of Spain or Portugal, may be assured in such way and manner, as if this Act had not been made.

Prohibition of re-insurances except in cases of insolvency, bankruptcy, or death.

4. [This section was repealed by 27 & 28 Vict. c. 56, § 1, which expressly legalises re-insurances. The repealing enactment being itself repealed by 30 Vict. c. 23, Schedule D., and also by 30 & 31 Vict. c. 59, re-insurances are thereby left as at Common Law, and therefore legal.]

Conditions for lending sums on bottomry upon ships bound for the East Indies.

5. [Repealed by Stat. Law Rev. Act, 1867.]

In all actions plaintiff to declare within fifteen days what sums he hath assured.

6. In all actions or suits brought or commenced after the said first day of August, by the assured, upon any policy of assurance, the plaintiff in such action or suit, or his attorney or agent, shall, within fifteen days after he or they shall be required so to do in writing, by the defendant, or his attorney or agent, declare in writing what sum or sums he hath assured, or caused to be assured in the whole, and what sums he hath borrowed at respondentia or bottomree, for the voyage, or any part of the voyage in question, in such suit or action.

Payment into Court by persons sued on policies.

7. [Repealed by Stat. Law Rev. Act, 1883.]

28 Geo. 3, c. 56.

An Act to repeal an Act, made in the Twenty-fifth Year of the Reign of his present Majesty, intituled, "An Act for regulating Insurances on Ships, and on Goods, Merchandizes, or Effects:" *and for substituting other Provisions for the like purpose, in lieu thereof.*

Preamble.

Whereas it hath been found, by experience, that great mischiefs and inconveniences have arisen to persons interested in ships or vessels, and also to persons using trade or commerce, from the effect of an Act made in the twenty-fifth year of the reign of his present Majesty, intituled, "An Act for regulating Insurances on Ships, and on Goods, Merchandizes, or Effects:" And whereas it is highly expedient that other and more convenient provisions should be made for the regulating insurances hereafter to be made on ships, and on goods, merchandizes, or effects, than those which are contained and enacted in and by the said Act; be it therefore enacted that the said Act is hereby repealed; and that, from and after the passing of this Act, it shall not be lawful for any person or persons to make or effect, or cause to be made or effected, any policy or policies of assurance upon any ship or ships, vessel or vessels, or upon any goods, merchandizes, effects, or other property whatsoever, without first inserting, or causing to be inserted, in such policy or policies of assurance, the name or names, or the usual stile and firm of dealing of one or more of the persons interested in such assurance; or without, instead thereof, first inserting, or causing to be inserted in such policy or policies of assurance, the name or names or the usual stile and firm of dealing of the consignor or consignors, consignee or consignees of the goods, merchandizes, effects, or property so to be insured; or the name or names, or the usual stile and firm of dealing of the person or persons residing in Great Britain, who shall receive the order for and effect such policy or policies of assurance, or of the person or persons who shall give the order or direction to the agent or agents immediately employed to negotiate or effect such policy or policies of assurance.

25 Geo. 3, c. 44, recited.

Recited Act repealed; and no policy to be made on any ship, &c., without inserting thereon the name or names or the firm of dealing of one or more of the persons interested, &c.

2. Every policy and policies of assurance, made or underwrote contrary to the true intent and meaning of this Act, shall be null and void to all intents and purposes whatsoever.

Policies made contrary to this Act to be void.

Appendix B.

[illegible]

[illegible]

[illegible]

1. [illegible] any [illegible] purporting to assign [illegible] ... the person in whose [illegible]

2. [illegible] make any assignment of a policy of [illegible] the policy in the words or to the [illegible]

3. For the purposes [illegible] construction of this Act the [illegible] shall mean any instrument [illegible] payment of money is assured or secured on the happening of any of the contingencies named or contemplated [illegible] of assurance known as "Lloyd's [illegible]" or in any other form adopted for insuring ships, freight, and goods carried by sea.

4. This Act may be cited for all purposes as the "Policies of Marine Assurance Act, 18[illegible]."

SCHEDULE.

Form of Assignment.

I, A. B. of, &c., do hereby assign unto C. D., &c., his *executors, administrators, and assigns,* the within policy of assurance *on the ship, freight, and the goods* therein carried [*or* on ship or *freight or goods, as the case may be*].

In witness whereof, &c.

XXXIV. Vict. c. XXI.

An Act for incorporating the members of the Establishment or Society formerly held at Lloyd's Coffee House in the Royal Exchange in the city of London, for the effecting of Marine Insurance, and generally known as Lloyd's; and for other purposes. [25*th May*, 1871.]

Fundamental rules in schedule.

19. The rules set forth in the schedule to this Act shall be the fundamental rules of the society.

THE SCHEDULE.

THE FUNDAMENTAL RULES OF THE SOCIETY.

1. There shall be underwriting members and non-underwriting members.

2. A non-underwriting member shall not underwrite in his own name at Lloyd's, or empower another person to underwrite for him at Lloyd's.

3. All underwriting business transacted at Lloyd's shall be conducted in the underwriting rooms, and not elsewhere.

4. An underwriting member shall not, by himself or by any partner or other substitute, directly or indirectly underwrite in the city of London a policy of insurance, as follows:—

(1) In the name of a partnership, or otherwise than in the name of one individual (being an underwriting member of the society) for each separate sum subscribed; or,

(2) For the account, benefit, or advantage of any company or association, unless they are subscribers to the society, nor unless every policy underwritten for their account, benefit, or advantage is underwritten in their ordinary place of business.

5. A member shall not open an insurance account in the name of any person not being a member or subscriber.

Appendix A.

54 & 55 VICT. c. 39. STAMP ACT, 1891.

Charge of Duty upon Instruments.

Charge of duties on schedule.

1. From and after the commencement of this Act the stamp duties to be charged for the use of Her Majesty upon the several instruments specified in the First Schedule to this Act shall be the stamp duties in the said schedule specified which duties shall be in substitution for the duties thereupon chargeable under the enactments repealed by this Act and shall be subject to the exemptions contained in this Act and in any other Act for the time being in force.

All duties to be paid and denoted according to regulations of Act.

2. All stamp duties for the time being chargeable by law upon any instruments are to be paid and denoted according to the regulations in this Act contained, and except where express provision is made to the contrary are to be denoted by impressed stamps only.

How instruments are to be written and stamped.

3.—"1. Every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped is to be so stamped, that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument written upon the same piece of material.

"2. If more than one instrument be written upon the same piece of material, every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable.

Instruments to be separately charged with duty in certain cases.

4. Except where express provision to the contrary is made by this or any other Act,—

(a) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters;

(b) An instrument made for any consideration in respect whereof it is chargeable with ad valorem duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations.

Production of Instruments in Evidence.

Terms upon which instruments not

14.—(1.) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any

part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

duly stamped may be received in evidence.

(2.) The officer, or arbitrator, or referee receiving the duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the Commissioners the name or title of the proceeding in which, and of the party from whom, he received the duty and penalty, and the date and description of the instrument, and shall pay over to such person as the Commissioners may appoint the money received by him for the duty and penalty.

(3.) On production to the Commissioners of any instrument in respect of which any duty or penalty has been paid, together with the receipt, the payment of the duty and penalty shall be denoted on the instrument.

(4.) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

Policies of Insurance.

Meaning of policy of insurance.

91. For the purposes of this Act the expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression "insurance" includes assurance.

Policies of Sea Insurance.

Meaning of policy of sea insurance.

92.—(1.) For the purposes of this Act the expression "policy of sea insurance" means any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or

Appendix B

Policies void in certain cases.

Policies void in certain other cases.

94. Where any sea insurance is made for a voyage and also for any time, or is extended to or over any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time.

Stamping policy after execution, &c.

95. (1.) A policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person, except in the two cases following; that is to say,

(a) Any policy of mutual insurance having a stamp impressed thereon may, if required, be stamped with an additional stamp provided that at the time when the additional stamp is required the policy has not been signed or underwritten to an amount exceeding the sum or sums which the duty impressed thereon extends to cover:

(b) Any policy made or executed out of, but being in any manner enforceable within, the United Kingdom, may

be stamped at any time within ten days after it has been first received in the United Kingdom on payment of the duty only.

(2.) Provided that a policy of sea insurance shall for the purpose of production in evidence be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of one hundred pounds.

Legal alterations in policies may be made under certain restrictions.

96. Nothing in this Act shall prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of sea insurance after the policy has been underwritten; provided that the alteration be made before notice of the determination of the risk originally insured, and that it do not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months, and that the articles insured remain the property of the same person or persons, and that no additional or further sum be insured by reason or means of the alteration.

Penalty on assuring unless policy duly stamped.

97.—(1.) If any person—

(a) becomes an assurer upon any sea insurance, or enters into any contract for sea insurance, or directly or indirectly receives or contracts or takes credit in account for any premium or consideration for any sea insurance, or knowingly takes upon himself any risk, or renders himself liable to pay, or pays, any sum of money upon any loss, peril, or contingency relative to any sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

(b) makes or effects, or knowingly procures to be made or effected, any sea insurance, or directly or indirectly gives or pays, or renders himself liable to pay, any premium, or consideration for any sea insurance, or enters into any contract for sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

(c) is concerned in any fraudulent contrivance or device, or is guilty of any wilful act, neglect, or omission, with intent to evade the duties payable on policies of sea insurance, or whereby the duties may be evaded,

he shall for every such offence incur a fine of one hundred pounds.

(2.) Every broker, agent, or other person negotiating or

Appendix A.

transacting any sea insurance contrary to the true intent and meaning of this Act, or writing any policy of sea insurance upon material not duly stamped, shall for every such offence incur a fine of one hundred pounds, and shall not have any legal claim to any charge for brokerage, commission, or agency, or for any money expended or paid by him with reference to the insurance, and any money paid to him in respect of any such charge shall be deemed to be paid without consideration, and shall remain the property of his employer.

(3.) If any person makes or issues, or causes to be made or issued, any document purporting to be a copy of a policy of sea insurance, and there is not at the time of the making or issue in existence a policy duly stamped whereof the said document is a copy, he shall for such offence in addition to any other fine or penalty to which he may be liable incur a fine of one hundred pounds.

Policies of Insurance except Policies of Sea Insurance.

Meaning of policy of life insurance and policy of insurance against accident.

98.—(1.) For the purposes of this Act the expression "policy of life insurance" means a policy of insurance upon any life or lives or upon any event or contingency relating to or depending upon any life or lives except a policy of insurance against accident; and the expression "policy of insurance against accident" means a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence or otherwise than from a natural cause, or as compensation for personal injury, and includes any notice or advertisement in a newspaper or other publication which purports to insure the payment of money upon the death of or injury to the holder or bearer of the newspaper or publication containing the notice only from accident or violence or otherwise than from a natural cause.

(2.) A policy of insurance against accident is not to be charged with any further duty than one penny by reason of the same extending to any payment to be made during sickness or incapacity from personal injury.

Duty on certain policies may be denoted by adhesive stamp.

99. The duty of one penny upon a policy of insurance other than a policy of sea insurance or life insurance may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the policy is first executed.

Penalty for not making out policy, or making, &c.

100. Every person who—

(1.) Receives, or takes credit for, any premium or consideration for any insurance other than a sea insurance, and

any policy not duly stamped.

does not, within one month after receiving, or taking credit for, the premium or consideration, make out and execute a duly stamped policy of insurance; or

(2.) Makes, executes, or delivers out, or pays or allows in account, or agrees to pay or allow in account, any money upon or in respect of any policy other than a policy of sea insurance which is not duly stamped;

shall incur a fine of twenty pounds.

FIRST SCHEDULE.

Stamp Duties on Instruments.

	£	s.	d.
Policy of Sea Insurance—			
(1.) Where the premium or consideration does not exceed the rate of 2*s.* 6*d.* per centum of the sum insured	0	0	1
(2.) In any other case—			
(a) For or upon any voyage—			
In respect of every full sum of 100*l.*, and also any fractional part of 100*l.* thereby insured	0	0	8
(b) For time—			
In respect of every full sum of 100*l.*, and also any fractional part of 100*l.* thereby insured—			
Where the insurance shall be made for any time not exceeding six months ..	0	0	3
Where the insurance shall be made for any time exceeding six months and not exceeding twelve months	0	0	6

APPENDIX B.

MARINE INSURANCE BILL, 1899.

[For the authorities on which Mr. M. D. Chalmers, the draftsman of this Bill, relies in support of its provisions, see Chalmers & Owen's Digest of the Law of Marine Insurance.]

A Bill intituled An Act for Codifying the Law relating to Marine Insurance.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Marine Insurance.

Marine insurance defined.

1. A contract of marine insurance is a contract of indemnity whereby the insurer undertakes to indemnify the assured in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

Sea and land transits, &c.

2.—(1.) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be interposed in, or subsidiary or incidental to, any sea voyage.

(2.) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

Marine adventure and maritime perils defined.

3.—(1.) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2.) In particular there is a marine adventure where—

(a) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property":

(b) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements is endangered by the exposure of insurable property to maritime perils:

(c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of its exposure to maritime perils.

"Maritime perils" mean the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seisures, and restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, whether of the like kind or not, which may be designated by the policy.

Insurable Interest.

Wagering or gaming contracts are void. [8 & 9 Vict. c. 109, and 19 Geo. 2, c. 37.]

4.—(1.) Every contract of marine insurance by way of gaming or wagering is void.

(2.) A contract of marine insurance is deemed to be a gaming or wagering contract—

(a) Where the assured has not an insurable interest as defined by this Act:

(b) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term.

Provided that where a second or other subsequent policy is effected on the same subject-matter and interest, it may be effected without benefit of salvage to the insurer.

Insurable interest defined.

5.—(1.) Subject to the provisions of this Act, every person has an insurable interest who, at the time of loss, is interested in a marine adventure.

(2.) In particular a person is interested in a marine adventure where he stands in any relation (legal or equitable) to the

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advantage in consequence of which he benefits by the safety or due arrival of insurable property, or is prejudiced by its loss or by damage thereto, or by the detention thereof, or incurs any liability in respect thereof.

'3.' A prospect or possibility of loss or gain, which, at the time of loss, is not founded on any right or liability legal or equitable in, or in respect of the subject-matter insured, is not insurable.

When interest must attach.

6.—1.) The assured must be interested in the subject-matter insured at the time of the loss.

Provided that where the subject-matter is insured "lost or not lost," it is immaterial that the assured may not have acquired his interest until after the loss, if at the time of effecting the contract of insurance he was not aware of the loss.

'2.' Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.

'3.' Where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise.

Defeasible or contingent interest.

7. A defeasible interest is insurable, as also is a contingent or inchoate interest.

Partial interest.

8. A partial interest of any nature is insurable.

Re-insurance.

9.—'1.' The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it.

(2.) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance.

Bottomry.

10. The lender of money on bottomry or respondentia has an insurable interest in respect of the loan.

Seaman's wages.

11. A seaman, as well as the master, has an insurable interest in respect of his wages.

Advance freight.

12. In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss.

Charges of insurance.

13. The assured has an insurable interest in the charges of any insurance which he may effect.

Quantum of interest.

14.—(1.) A carrier or other bailee who is responsible for insurable property has an insurable interest to the extent of his responsibility.

(2.) Where the subject-matter insured is mortgaged, the mort-

gagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.

(3.) Where a mortgagee insures for the benefit of the mortgagor as well as for himself, he has an insurable interest in respect of the full value, though he effect the insurance in his own name only.

(4.) Where a consignee, having an interest in the consignment, insures for the benefit of other persons interested as well as for himself, he has an insurable interest in respect of the full value of his and their interests in the consignment, though he effect the insurance in his own name only.

(5.) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.

Provided that nothing in this section shall affect the provisions of this Act relating to double insurance, or the right of subrogation.

Assignment of interest.

15. Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

But the provisions of this section do not apply to a transmission of interest by operation of law.

Insurable Value.

Measure of insurable value.

16. Subject to any express provision or valuation in the policy, the insurable value of the subject-matters insured must be ascertained as follows:—

(1.) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or period of time covered by the policy, plus the charges of insurance upon the whole;

The term "ship," in the case of a steamship, includes the machinery, boilers, coals, and engine stores, and in the case of a ship engaged in a regular trade, the permanent fittings requisite for the trade:

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'1.) In insurance on freight whether paid in advance or otherwise the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance:

'2.) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of shipping and the charges of insurance upon the whole:

'4.) In insurance on any other subject-matter or interest, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.

Disclosure and Representations.

Insurance is uberrimæ fidei.

17. A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

Disclosure by assured.

18.—'1.) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure the insurer may avoid the contract.

'2.) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

'3.) In the absence of inquiry the following circumstances need not be disclosed, namely:—

'(a) Any circumstance which diminishes the risk:

(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know:

(c) Any circumstance as to which information is waived by the insurer:

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4.) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

The term "circumstance" includes any communication made to, or information received by, the assured.

Disclosure by agent effecting insurance.

19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him:

(b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

Representations pending negotiation of contract.

20.—(1.) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2.) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3.) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

A representation as to a matter of fact is true, if it be substantially correct, whether it be literally correct or not.

A representation as to a matter of expectation or belief is true if it be made in good faith.

(4.) A representation may be withdrawn or corrected before the contract is concluded.

(5.) Whether a particular representation be material or not is, in each case, a question of fact.

Assured need not disclose his opinion.

21. The assured, or his agent, is not bound, even in reply to inquiry, to give his opinion to the insurer on any matter relating to the adventure.

When contract is deemed to be concluded.

22. A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

The Policy.

Contract must be embodied in policy. [54 & 55 Vict. c. 39, s. 93.]

23. Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may

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be executed and issued either at the time when the contract is concluded, or afterwards.

What policy must specify. [28 Geo. 3, c. 56, and 54 & 55 Vict. c. 39, s. 93.]

24. A marine policy must specify—

(1.) The name of the assured, or of some person who effects the insurance on his behalf:

(2.) The undertaking to insure:

(3.) The subject-matter insured and the risk insured against:

(4.) The voyage, or period of time, or both, as the case may be, covered by the insurance:

(5.) The sum or sums insured:

(6.) The name or names of the insurers.

Signature of insurer.

25.—(1) A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal.

(2.) Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.

Voyage and time policies.

26.—(1) Where the contract is to insure the subject-matter at and from, or from one specified place to another, the policy is called a "voyage policy," and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy." A contract for both voyage and time may be included in the same policy.

[54 & 55 Vict. c. 39, s. 93.]

(2.) A time policy which is made for any time exceeding twelve months is invalid.

Designation of subject-matter.

27.—(1) The subject-matter insured must be designated in a marine policy with reasonable certainty.

(2.) The nature of the interest of the assured in the subject-matter insured need not be specified in the policy unless it be of such a character as to materially affect the risk.

Provided that where an insurance is effected by a lender on bottomry or respondentia, the nature of his interest must be specified; and a policy effected by way of re-insurance must specify that it is a re-insurance.

(3.) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4.) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.

28.—(1.) A policy may be either valued or unvalued.

Valued policy.

(2.) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

(3.) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is conclusive, for the purposes of the policy, as between the insurer and assured, whether the loss be total or partial.

(4.) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

Unvalued policy.

29.—An unvalued policy is a policy which does not specify the value of the subject-matter insured, but subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner hereinbefore specified.

Floating policy by ship or ships.

30.—(1.) A floating policy is a policy which describes the insurance in general terms, and leaves either the name of the ship or ships or other particulars to be defined by subsequent declaration.

(2.) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.

(3.) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4.) Where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

Construction of terms in policy.

31.—(1.) A policy may be in the form in the First Schedule to this Act.

(2.) Unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.

Premium to be arranged.

32.—(1.) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable.

(2.) Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable.

Double Insurance.

Double insurance

22.—(1.) Where two or more policies are effected by or on behalf of the assured in the same interest and upon the same adventure and risk, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance.

(2.) Where the assured is over-insured by double insurance—

(a.) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive from all the insurers more than the indemnity allowed by this Act:

(b.) Where the policy under which the assured claims is a valued policy, the assured must give credit, as against the valuation, for any sum received by him under any other policy without regard to the actual value of the subject-matter insured:

(c.) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full indemnity value, for any sum received by him under any other policy:

(d.) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.

Warranties, &c.

Nature of warranty.

24.—(1.) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2.) A warranty may be express or implied.

(3.) A warranty, as above defined, is a condition precedent to the liability of the insurer which must be fully and exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to the provisions of this Act, the insurer may avoid the contract as from the date of the breach of warranty, but without prejudice to any liability incurred by him before such date.

When breach of warranty excused.

35.—(1.) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by subsequent legislation.

(2.) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

Express warranties.

36.—(1.) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2.) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3.) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

Warranty of neutrality.

37.—(1.) Where a ship is expressly warranted "neutral," she must be neutral at the commencement of the risk, and it is an implied term of the warranty that, so far as the assured can control the matter, she shall continue neutral during the risk.

(2.) Where a ship is expressly warranted "neutral" there is an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

(3.) Where goods or other moveables are expressly warranted "neutral" there is an implied condition that they shall be neutral-owned throughout the risk, and properly documented, and shall be shipped by a neutral ship to a neutral destination, and that, so far as the assured can control the matter, the ship shall continue neutral throughout the risk.

No implied warranty of nationality.

38. There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

Warranty of good safety.

39. Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

Warranty of seaworthiness of ship.

40.—(1.) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

Where the policy attaches while the ship is in port, she must

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and at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

Provided that where the policy contemplates a voyage in different stages during which the subject-matter insured will be exposed to different degrees or kinds of peril, or the ship will require different kinds of equipment, the ship must be seaworthy at the commencement of each stage, and it is sufficient if at the commencement of each stage she is seaworthy for the purpose of that stage.

2. A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

3. In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

No implied warranty that goods are seaworthy.

41. In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

Warranty of legality.

42. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

The Voyage.

Implied condition as to commencement of risk.

43.—(1.) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

(2.) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he acquiesced in the delay.

Abandonment of adventure by delay, &c.

44.—(1.) Where the assured abandons the adventure insured, the contract of marine insurance is determined.

(2.) In particular, where, before the commencement of the risk, the destination of the ship is changed to a place not covered by the policy, the adventure is deemed to be abandoned.

Change of voyage.

45.—(1.) Where, after the commencement of the risk, the destination of the ship is changed from the destination contem-

plated by the policy there is said to be a change of voyage. The destination of the ship is deemed to be changed as soon as the election to change it is made.

(2.) Unless the policy otherwise provides, where there is a change of voyage, the insurer may avoid the contract as from the time of change, that is to say, as from the time when the election to change it is made; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

Departure on voyage.

46. Where the place of departure is specified by the policy, and the ship does not sail from that place, the risk does not attach.

Deviation.

47.—(1.) Where a ship, without lawful excuse or justification, deviates from the voyage contemplated by the policy, the insurer may avoid the contract as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2.) There is a deviation from the voyage contemplated by the policy:—

(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from;

(b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from;

(c) Where the course of the voyage is not prescribed by the policy or by custom, but the course which would be taken by a prudent master, navigating the ship in a seamanlike manner, is departed from with the privity of the assured.

(3.) The intention to deviate is immaterial; there must be a deviation in fact to enable the insurer to avoid the contract.

Several ports of discharge.

48.—(1.) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, and the omission to proceed to one or more of the ports so specified is not a deviation.

(2.) Where several ports of discharge are specified by the policy the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or to such of them as she elects to go, in the order designated by the policy. If she does not there is a deviation.

(3.) Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them,

[illegible]

Appendix 2

[illegible]

Power to [illegible]

[illegible]

Provisions [illegible]

[illegible]

Assignment of Policy.

When and how policy is assignable.

51.—(1.) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.

(2.) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3.) A marine policy may be assigned by indorsement thereon or in other customary manner, and a policy indorsed in blank may be assigned by delivery.

(4.) Nothing in this section shall affect the assignability of a marine policy as a chose-in-action according to general law.

52. Where the assured has parted with or lost his interest in the subject matter insured, and has not before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative, and the policy is deemed to have lapsed. Assured who has no interest cannot assign.

Provided that this section does not apply to the assignment of a policy after loss.

The Premium.

53. Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium. When premium payable.

54.—(1.) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium. Policy effected through broker.

(2.) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and where he has dealt with the person who employs him as a principal he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent.

55. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker. Effect of receipt on policy.

Loss and Abandonment.

56.—(1.) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against. Included and excluded losses.

(2.) The insurer is not liable for any loss attributable to the misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril

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or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(7.) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits the loss and the sufficiency of the notice.

(8.) Notice of abandonment is unnecessary where at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(9.) Notice of abandonment may be waived by the insurer.

(10.) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

(11.) Where the assured has given a notice of abandonment which has not been accepted, the validity of the abandonment must be determined with reference to the state of affairs at the time of action brought.

Effect of abandonment.

64.—(1.) Where there is a valid abandonment, whatever remains of the subject matter insured thereupon vests in the insurer, and the insurer is subrogated to all rights and remedies of the assured in and in respect of the subject matter insured as from the time of the casualty causing the loss.

(2.) Upon abandonment, any act or thing done subsequent to the casualty causing the loss by the assured or his agents in respect of the subject matter insured, is at the risk of the insurer and for his benefit, provided such act or thing be done in good faith and reasonably.

(3.) Upon the abandonment of a ship the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, but with this exception he acquires no rights in respect of any contract of affreightment which the assured may have.

Where the ship is carrying the owners' goods the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

Partial Losses (including Salvage and General Average).

Particular average loss.

65.—(1.) A partial loss of the subject matter insured may be either a particular average loss or a general average loss.

(2.) A particular average loss is a loss, caused by a peril insured against, which is not a general average loss, and which falls exclusively on the owner or other person interested in insurable property, giving him no right of contribution against

other persons who may be interested in the common marine adventure.

Salvage charges.

66. Subject to any express provision in the policy, salvage charges may be recovered in like manner as a particular average loss.

"Salvage charges" mean the charges recoverable by a salvor, under maritime law. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

General average loss.

67.—(1.) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2.) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the common marine adventure.

(3.) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested in the common marine adventure. Such contribution is called a general average contribution. Apart from special contract, the parties interested in the common marine adventure are the owners of ship freight and cargo.

(4.) Subject to any express provision in the policy, where the assured has suffered a general average loss he may recover from the insurer in respect of the proportion of the loss which falls upon him; and when the loss is caused by jettison, and jettison is a peril insured against, he may recover from the insurer in respect of the whole loss without having enforced or giving credit for his right of contribution from the other parties liable to contribute. But nothing in this sub-section shall affect the insurer's right of subrogation on payment.

(5.) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution he may recover therefor from the insurer.

Provided that, in the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against.

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[illegible] It is the duty of the assured and his agents to take such steps as may be reasonable to prevent that a general average contribution which is liable to attach or which is incurred and allowed, and for loss of or on the cargo and this in time.

[illegible] When ship, freight and cargo are owned by the same assured he may recover not only from the insurers for any loss which would constitute a general average loss if there were different owners.

Measure of Indemnity.

Extent of liability of insurer for loss.

68. Where there is a loss recoverable under the policy, the insurer or each insurer if there be more than one, is liable for such proportion of the loss as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

The liability of the insurer for expenses properly incurred pursuant to the suing and labouring clause must be determined on the same principle.

Total loss.

69. Where there is a total loss of the subject matter insured:—

1. If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy.

2. If the policy be an unvalued policy, the measure of indemnity subject to the limit of the sum insured and any express provision in the policy, is the insurable value of the subject matter insured.

Partial loss of ship.

70. Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—

'1.) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions mentioned in the Second Schedule to this Act but not exceeding the sum insured in respect of any one casualty.

'2.) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above.

(3.) Where the ship has not been repaired the assured is

entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

(4.) Where the ship has not been repaired, and is sold in her damaged state during the risk, the assured is entitled to the reasonable cost of repairing such damage, computed as above, but not exceeding the actual depreciation in the value of the ship as ascertained by the sale.

Partial loss of freight.

71. Where there is a partial loss of freight, the measure of indemnity (subject to the limit of the sum insured, and any express provision in the policy) is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value, in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

Partial loss of goods, merchandise, &c.

72. Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to the limits of the sum insured and any express provision in the policy, is as follows:—

(1.) Where part of the goods, merchandise, or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy.

(2.) Where part of the goods, merchandise or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss.

(3.) Where the whole or any part of the goods, or merchandise insured has been delivered damaged at its destination, the measure of indemnity is the ratio of loss, ascertained by comparing the gross sound and damaged values, reduced to the same cash basis, at the time and place of arrival, applied to the sum fixed by the policy, in the case of a valued policy, or to the insurable value, in the case of an unvalued policy.

(4.) "Gross value" means the price which a wholesale buyer would give with freight, landing charges and duty paid beforehand; provided that in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds"

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mean the actual price obtained at a sale where all charges on sale are paid by the sellers.

(5.) Where any sale or other charges on damaged goods or merchandise are paid or payable by the buyers, such charges must be added to the gross proceeds before establishing the ratio of damage, as above provided, and in the event of a claim being established, such charges are subsequently recoverable from the insurer as "Extra charges."

Apportionment of valuation.

73. Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their relative insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole ascertained in both cases as above.

General average contributions.

74. Subject to the limit of the sum insured and any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution if the subject matter liable to contribution is insured for its full contributory value; but if such subject matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance.

Liabilities to third parties.

75. Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to the limit of the sum insured and any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.

General provisions as to measure of indemnity.

76.—(1.) Where there has been a loss in respect of any subject matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case, but if there be no provision applicable to the case, then in accordance with usage.

(2.) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject matter insured was not at risk under the policy.

Particular average warranties.

77.—(1.) Where the subject matter insured is warranted free from particular average, the assured cannot recover for a loss

of part, whether the policy be valued or unvalued, unless the contract contained in the policy be apportionable; but if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

The contract is apportionable where by the policy itself separate parcels are separately valued, or where by usage the contract is treated as apportionable.

(2.) Where the subject matter insured is warranted free from particular average, either generally or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

(3.) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage—

(a) A general average loss or liability cannot be added to a particular average loss to make up the specified percentage;

(b) In the case of a voyage policy, successive losses may be added together to make up the specified percentage;

(c) In the case of a time policy, successive losses on the same voyage may be added together, but losses occurring on different voyages cannot be added together, to make up the specified percentage.

For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject matter insured.

Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded. But conditioning charges and other expenses, incurred at the port of destination, which diminish the loss to an extent exceeding the said charges and expenses may be added to the loss eventually ascertained.

Cumulative losses.

78.—(1.) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

(2.) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss.

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

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Suing and labouring clause.

79.—(1.) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject matter may have been warranted free from particular average, either generally or under a certain percentage.

(2.) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3.) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4.) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

Rights of Insurer on Payment.

Right of subrogation.

80.—(1.) Where the insurer pays for a total loss, whatever may remain of the subject matter insured thereupon vests in him and he is thereby subrogated to all the rights and remedies of the assured in and in respect of the subject matter insured as from the time of the casualty causing the loss.

(2.) Where the insurer pays for a partial loss, the subject matter insured, or such part of it as may remain, does not vest in him, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

Right of contribution.

81.—(1.) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

(2.) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

Return of Premium.

Enforcement of return.

82. Where the premium, or a proportionate part thereof is, by this Act, declared to be returnable:—

(a) If already paid, it may be recovered by the assured from the insurer, and,

(b) If unpaid, it may be retained by the assured or his agent.

Return by agreement.

83. Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured.

Return for failure of consideration.

84.—(1.) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

(2.) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

(3.) In particular—

(a) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable.

(b) Where the subject matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable.

Provided that where the subject matter has been insured "lost or not lost" and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival.

(c) Where the assured has no insurable interest throughout the currency of the risk the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering.

(d) Where the assured has a defeasible interest which is terminated during the currency of the risk the premium is not returnable.

(e) Where the assured has over-insured under an unvalued

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or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(7.) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits the loss and the sufficiency of the notice.

(8.) Notice of abandonment is unnecessary where at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(9.) Notice of abandonment may be waived by the insurer.

(10.) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

(11.) Where the assured has given a notice of abandonment which has not been accepted, the validity of the abandonment must be determined with reference to the state of affairs at the time of action brought.

Effect of abandonment.

64.—(1.) Where there is a valid abandonment, whatever remains of the subject matter insured thereupon vests in the insurer, and the insurer is subrogated to all rights and remedies of the assured in and in respect of the subject matter insured as from the time of the casualty causing the loss.

(2.) Upon abandonment, any act or thing done subsequent to the casualty causing the loss by the assured or his agents in respect of the subject matter insured, is at the risk of the insurer and for his benefit, provided such act or thing be done in good faith and reasonably.

(3.) Upon the abandonment of a ship the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, but with this exception he acquires no rights in respect of any contract of affreightment which the assured may have.

Where the ship is carrying the owners' goods the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

Partial Losses (including Salvage and General Average).

Particular average loss.

65.—(1.) A partial loss of the subject matter insured may be either a particular average loss or a general average loss.

(2.) A particular average loss is a loss, caused by a peril insured against, which is not a general average loss, and which falls exclusively on the owner or other person interested in insurable property, giving him no right of contribution against

other persons who may be interested in the common marine adventure.

Salvage charges.

66. Subject to any express provision in the policy, salvage charges may be recovered in like manner as a particular average loss.

"Salvage charges" mean the charges recoverable by a salvor, under maritime law. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

General average loss.

67.—(1.) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2.) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the common marine adventure.

(3.) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested in the common marine adventure. Such contribution is called a general average contribution. Apart from special contract, the parties interested in the common marine adventure are the owners of ship freight and cargo.

(4.) Subject to any express provision in the policy, where the assured has suffered a general average loss he may recover from the insurer in respect of the proportion of the loss which falls upon him; and when the loss is caused by jettison, and jettison is a peril insured against, he may recover from the insurer in respect of the whole loss without having enforced or giving credit for his right of contribution from the other parties liable to contribute. But nothing in this sub-section shall affect the insurer's right of subrogation on payment.

(5.) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution he may recover therefor from the insurer.

Provided that, in the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against.

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(6.) It is the duty of the shipowner and his agents to take such steps as may be reasonable to provide that all general average contributions (whether due to himself or others) are adjusted and collected, and he has a lien on the cargo until this be done.

(7.) Where ship, freight, and cargo are owned by the same assured, he may recover *pro tanto* from the insurers for any loss which would constitute a general average loss if there were different owners.

Measure of Indemnity.

Extent of liability of insurer for loss.

68. Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the loss as the amount of his subscription bears to the value fixed by the policy, in the case of a valued policy, or to the insurable value, in the case of an unvalued policy.

The liability of the insurer for expenses properly incurred pursuant to the suing and labouring clause must be determined on the same principle.

Total loss.

69. Where there is a total loss of the subject matter insured:—

(1.) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy.

(2.) If the policy be an unvalued policy, the measure of indemnity (subject to the limit of the sum insured and any express provision in the policy), is the insurable value of the subject matter insured.

Partial loss of ship.

70. Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1.) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions mentioned in the Second Schedule to this Act but not exceeding the sum insured in respect of any one casualty.

(2.) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above.

(3.) Where the ship has not been repaired the assured is

entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

(4.) Where the ship has not been repaired, and is sold in her damaged state during the risk, the assured is entitled to the reasonable cost of repairing such damage, computed as above, but not exceeding the actual depreciation in the value of the ship as ascertained by the sale.

Partial loss of freight.

71. Where there is a partial loss of freight, the measure of indemnity (subject to the limit of the sum insured, and any express provision in the policy) is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value, in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

Partial loss of goods, merchandise, &c.

72. Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to the limits of the sum insured and any express provision in the policy, is as follows:—

(1.) Where part of the goods, merchandise, or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy.

(2.) Where part of the goods, merchandise or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss.

(3.) Where the whole or any part of the goods, or merchandise insured has been delivered damaged at its destination, the measure of indemnity is the ratio of loss, ascertained by comparing the gross sound and damaged values, reduced to the same cash basis, at the time and place of arrival, applied to the sum fixed by the policy, in the case of a valued policy, or to the insurable value, in the case of an unvalued policy.

(4.) "Gross value" means the price which a wholesale buyer would give with freight, landing charges and duty paid beforehand; provided that in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds"

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mean the actual price obtained at a sale where all charges on sale are paid by the sellers.

(5.) Where any sale or other charges on damaged goods or merchandise are paid or payable by the buyers, such charges must be added to the gross proceeds before establishing the ratio of damage, as above provided, and in the event of a claim being established, such charges are subsequently recoverable from the insurer as "Extra charges."

Apportionment of valuation.

73. Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their relative insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole ascertained in both cases as above.

General average contributions.

74. Subject to the limit of the sum insured and any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution if the subject matter liable to contribution is insured for its full contributory value; but if such subject matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance.

Liabilities to third parties.

75. Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to the limit of the sum insured and any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.

General provisions as to measure of indemnity.

76.—(1.) Where there has been a loss in respect of any subject matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case, but if there be no provision applicable to the case, then in accordance with usage.

(2.) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject matter insured was not at risk under the policy.

Particular average warranties.

77.—(1.) Where the subject matter insured is warranted free from particular average, the assured cannot recover for a loss

of part, whether the policy be valued or unvalued, unless the contract contained in the policy be apportionable; but if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

The contract is apportionable where by the policy itself separate parcels are separately valued, or where by usage the contract is treated as apportionable.

(2.) Where the subject matter insured is warranted free from particular average, either generally or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

(3.) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage—

(a) A general average loss or liability cannot be added to a particular average loss to make up the specified percentage;

(b) In the case of a voyage policy, successive losses may be added together to make up the specified percentage;

(c) In the case of a time policy, successive losses on the same voyage may be added together, but losses occurring on different voyages cannot be added together, to make up the specified percentage.

For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject matter insured.

Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded. But conditioning charges and other expenses, incurred at the port of destination, which diminish the loss to an extent exceeding the said charges and expenses may be added to the loss eventually ascertained.

Cumulative losses.

78.—(1.) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

(2.) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss.

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

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Suing and labouring clause.

79.—(1.) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject matter may have been warranted free from particular average, either generally or under a certain percentage.

(2.) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3.) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4.) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

Rights of Insurer on Payment.

Right of subrogation.

80.—(1.) Where the insurer pays for a total loss, whatever may remain of the subject matter insured thereupon vests in him and he is thereby subrogated to all the rights and remedies of the assured in and in respect of the subject matter insured as from the time of the casualty causing the loss.

(2.) Where the insurer pays for a partial loss, the subject matter insured, or such part of it as may remain, does not vest in him, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

Right of contribution.

81.—(1.) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

(2.) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

Return of Premium.

Enforcement of return.

82. Where the premium, or a proportionate part thereof is, by this Act, declared to be returnable:—

(a) If already paid, it may be recovered by the assured from the insurer, and,

(b) If unpaid, it may be retained by the assured or his agent.

Return by agreement.

83. Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured.

Return for failure of consideration.

84.—(1.) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

(2.) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

(3.) In particular—

(a) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable.

(b) Where the subject matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable.

Provided that where the subject matter has been insured "lost or not lost" and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival.

(c) Where the assured has no insurable interest throughout the currency of the risk the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering.

(d) Where the assured has a defeasible interest which is terminated during the currency of the risk the premium is not returnable.

(e) Where the assured has over-insured under an unvalued

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policy, a proportionate part of the premium is returnable.

(f) Where the assured has over-insured by double insurance, a proportionate part of the several premiums is not returnable.

Mutual Insurance.

Modification of Act in mutual insurance.

85.—(1.) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance, and such persons are called the members of a mutual insurance association.

(2.) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium.

(3.) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

(4.) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.

Supplemental.

Ratification by assured.

86. Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss.

Voidable contracts.

87. Where a contract of marine insurance may be avoided by one of the parties thereto, the party entitled to avoid it is discharged from all liability under his contract unless and until he elects to confirm the contract.

Where the party entitled to avoid the contract is aware of the facts which entitle him to avoid it, and does not within a reasonable time signify his election to avoid it to the other party, this is evidence of an election to confirm the contract.

Implied obligations varied by agreement or usage.

88. Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.

The provisions of this section extend to any right, duty, or liability which under this Act may be modified by agreement.

Reasonable time, &c. a question of fact.

89. Where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question what is reasonable is a question of fact.

Slip as evidence.

90. Where there is a duly stamped policy reference may be made, as heretofore, to the slip or covering note, in any action for rectifying or avoiding the policy.

Interpretation of terms.

91. In this Act, unless the context or subject matter otherwise requires—

"Action" includes counter-claim and set off:

"Assured" includes the agent of the assured:

"Freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money:

"Insurer" includes the agent of the insurer:

"Moveables" mean any moveable tangible property, other than the ship, and include money, valuable securities, and other documents:

"Policy" means a marine policy.

Savings.

92.—(1.) Nothing in this Act or in any repeal effected thereby shall affect:—

(a) The provisions of the Stamp Act, 1891, or any enactment for the time being in force relating to the revenue.

(b) The provisions of the Companies Act, 1862, or any enactment amending or substituted for the same.

(c) The provisions of any statute not expressly repealed by this Act.

(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the effect of fraud, illegality, misrepresentation, and mistake, shall continue to apply to contracts of marine insurance.

Repeals.

93. The enactments mentioned in the Third Schedule to this Act are hereby repealed to the extent specified in that schedule.

Commencement.

94. This Act shall come into operation six months after the passing thereof.

Short title.

95. This Act may be cited as the Marine Insurance Act, 1899.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Time of the risk.

2. Where the subject-matter is insured "lost or not lost," and is not then lost, or not lost to the extent insured, the risk attaches from the time when the contract is concluded, unless the parties agree that it shall attach at some other time.

From.

3. Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured.

At and from.

Ship.

4. Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.

If she be not at that place when the contract is concluded the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

Freight.

Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

Where freight, other than chartered freight, is insured "at and from" a particular place, the risk attaches pro rata as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.

From the loading thereof.

4. Where goods or other moveables are insured "from the loading thereof," the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship.

Safely landed.

5. Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary

manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases.

Touch and stay.

6. In the absence of any further licence or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination.

Perils of the seas.

7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

Fire.

8. The term "fire" does not cover a loss caused by the explosion of steam, nor a fire caused by the inherent vice of the subject matter insured, but it does cover a fire voluntarily caused in order to avoid capture by an enemy.

Pirates.

9. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.

Thieves.

10. The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.

Restraint of princes.

11. The term "arrests, &c., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or ordinary judicial process.

Barratry.

12. The term "barratry" includes every wrongful act wilfully committed by the master or crew with intent to defraud the owner, or, as the case may be, the charterer.

All other perils.

13. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

Average unless general.

14. The term "average unless general" means a partial loss of the subject matter insured other than a general average loss, and does not include "particular charges."

Stranded.

15. Where the ship has stranded the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board.

Ship.

16. The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a regular trade, the permanent fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals.

Freight.

17. The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money.

Appendix B.

Goods.

18. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

Sect. 70.

SECOND SCHEDULE.

In the adjustment of claims for particular average in a policy on ship, in the absence of any special provision in the policy, the following items for repairing damage or making good losses shall be recoverable from the insurer without deduction, new for old :—

Graving dock expenses.
Cost of removals.
Use of shears, stages, and graving dock appliances.
Cost of anchors, provisions, and stores.
Cost of temporary repairs.
Cost of straightening bent ironwork.
All repairs of damage sustained by a vessel on her first voyage.

Chain cables shall be subject to a deduction of one-sixth.

All other repairs of damage sustained after the first voyage shall be subject to a deduction of one-third.

Sect. 93.

THIRD SCHEDULE.

Enactments Repealed.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 Geo. 2, c. 37....	An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandizes or effects laden thereon.	The whole Act.
28 Geo. 3, c. 56....	An Act to repeal an Act made in the twenty-fifth year of the reign of his present Majesty, intituled "An Act for regulating Insurances on Ships, and on goods, merchandizes, or effects," and for substituting other provisions for the like purpose in lieu thereof.	The whole Act so far as it relates to marine insurance.
31 & 32 Vict. c. 86.	The Policies of Marine Assurance Act, 1868.	The whole Act.

APPENDIX C.

SPECIMEN SLIPS.

(SLIP for a Lloyd's policy, with Institute Voyage Clauses, on steamship "Xerxes," valued at 20,000*l.* on hull, &c., and 10,000*l.* on machinery, for a voyage from Havre to Bristol Channel, Colombo and Burmah, and back to the United Kingdom or Continent between Bordeaux and Hamburg, at a premium of 45/- per cent., or to Copenhagen or Flensburg on payment of an additional premium of 2/6.)

No.———

X. Y. & Co. (brokers).

CASH.

Deviation, F.G.A., R.D.C., No thirds, and Negligence.

F.C. & S.

Add to free of average clause "sunk, on fire, or caused by collision with another vessel. To pay fire irrespective percentage."

(*The above is printed; the remainder is in writing.*)

"XERXES."

Havre, B. Chan., Colombo and Burmah, and U. K. Cont. $\frac{B.}{H.}$ & 30 ds.

Ship - - -	£20,000
Machy. - -	10,000
	£30,000

45/-

Inst. Voyage Clauses.

2/6 add. C'hagen or F'burg.

2000 C. D. 15/6. (*Subscription of C. D. for* 2,000*l.*, *dated the* 15*th of June. The other subscriptions follow, or are written on the back of the slip.*)

———, 1901.

Appendix I.

[illegible] for a [illegible] with Institute Time Clauses on the steamship "[illegible]" for three months beginning on the [illegible] at a premium of [illegible] per cent. The following warranties are to be current. Warranted to leave [illegible] ports except for coaling warranted to leave or [illegible] from the 1st of October to the 1st of April. Warranted not east of Singapore except [illegible] Saigon, Bangkok and Australasia. For an additional premium of [illegible] will run these warranties except as to Pacific North America from the 1st of September to the 1st of April.

X.——

X Y & Co.

LAST.

Insurance F. C. & A. R. S. & N.; Strikes and Negligences. All duty returns for cancelling and lying up.

Add to free of average clause "sunk on fire or in dock" &c.

The above in print; the remainder in writing.

"XERXES."

	No B. N. A.
12 months [illegible] 31st Feb. 1901.	Ex. coaling at Halifax.
Ship - - - £20,000	Baltic) 1 10, 1 4
Machy. - - - 10,000	White Sea)
	E. Sing., Java, S'goa,
Time Clauses, 1901.	B'kok & Australasia ex.

9½ Gs.

21'- cancels ex. B. N. A., 1 9, 1 4.

2,000 C. D. 15/1.

&c., &c. (*Other subscriptions.*)

——, 1901.

INSTITUTE VOYAGE CLAUSES. 1901.

(*The collision clauses are framed for a company's policy; for a form of collision clause to be used with a Lloyd's policy, see* ante, Vol. I., *s.* 10.)

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured; and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur or be compelled to pay; but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

Should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

This insurance also specially to cover (subject to the free of

Appendix C. average warranty) loss of, or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

General average and salvage charges payable according to foreign statement, or per York-Antwerp Rules if in accordance with the contract of affreightment.

Average payable on each valuation separately or on the whole without deduction of thirds, new for old, whether the average be particular or general.

Donkey boilers, winches, cranes, windlasses, steering gear, and electric light apparatus shall be deemed to be part of the hull, and not part of the machinery. Refrigerating machinery and insulation not covered unless expressly included in this policy.

Warranted free from particular average under 3 per cent., but nevertheless when the vessel shall have been stranded, sunk, on fire, or in collision with any other ship or vessel, underwriters to pay the damage occasioned thereby. No claim shall be allowed in respect of scraping or painting the vessel's bottom, whether she be stranded or not; but the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found.

Grounding in the Suez Canal, or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Ayres) or its tributaries, or in the Danube, Demerara, or Bilbao River, or on the Yenikale or Bilbao Bar, shall not be deemed to be a stranding.

The insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss.

In the event of accident whereby loss or damage may result in a claim under this policy, notice shall be given in writing to the underwriters where practicable, and, if abroad, to the nearest Lloyd's agent also, prior to survey, so that they may appoint their own surveyor if they so desire; and whenever the extent of the damage is ascertainable, the underwriters may take or may require the assured to take tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of underwriters, the underwriters will make

an allowance at the rate of £30 per cent. per annum on the insured value for the time actually lost in waiting for tenders. In the event of the assured failing to comply with the conditions of this clause, £15 per cent. shall be deducted from the amount of the ascertained claim.

Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

Held covered in case of deviation or change of voyage provided notice be given and any additional premium required be agreed immediately after receipt of advices.

With leave to sail with or without pilots, and to tow and assist vessels or craft in all situations, and to be towed.

With leave to dock and undock and go into graving dock.

INSTITUTE TIME CLAUSES. 1901.

1. And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay; but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for

Appendix C. *removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.*

2. Should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

3. In port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and to go on trial trips.

4. Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given, and any additional premium required be agreed immediately after receipt of advices.

5. Should the vessel be sold or transferred to new management, then, unless the underwriters agree in writing to such sale or transfer, this policy shall thereupon become cancelled from date of sale or transfer, unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro ratâ* daily return of premium shall be made.

6. This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

7. General average and salvage charges payable according to

foreign statement, or per York-Antwerp Rules, if in accordance with the contract of affreightment. Appendix C.

8. Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the average be particular or general.

9. Donkey boilers, winches, cranes, windlasses, steering gear, and electric light apparatus shall be deemed to be part of the hull, and not part of the machinery. Refrigerating machinery and insulation not covered unless expressly included in this policy.

10. Warranted free from particular average under 3 per cent., but nevertheless when the vessel shall have been stranded, sunk, on fire, or in collision with any other ship or vessel, underwriters to pay the damage occasioned thereby. No claim shall be allowed in respect of scraping or painting the vessel's bottom, whether she be stranded or not; but the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found.

11. Grounding in the Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Ayres) or its tributaries, or in the Danube, Demerara, or Bilbao River, or on the Yenikale or Bilbao Bar shall not be deemed to be a stranding.

12. The warranty and conditions as to average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the assured when making up the claim, viz.: at any time at which the vessel (1) begins to load cargo or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, particular average occurring outside the period covered by this policy may be added to particular average occurring within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such

Appendix C. period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding policy.

13. In no case shall underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy.

14. The insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss.

15. In the event of accident whereby loss or damage may result in a claim under this policy, notice shall be given in writing to the underwriters, where practicable, and, if abroad, to the nearest Lloyd's agent also, prior to survey, so that they may appoint their own surveyor if they so desire; and whenever the extent of the damage is ascertainable, the underwriters may take or may require the assured to take tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of underwriters, the underwriters will make an allowance at the rate of £30 per cent. per annum on the insured value for the time actually lost in waiting for tenders. In the event of the assured failing to comply with the conditions of this clause, £15 per cent. shall be deducted from the amount of the ascertained claim.

16. Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war.

17. To return { per cent. for each uncommenced month if it be mutually agreed to cancel this policy. / as follows for each consecutive 30 days the vessel may be laid up in port, viz.:— / per cent. if in the United Kingdom not under average. / per cent. under average, or if abroad } and arrival.

£——— *Sum insured.*

THE A. STEAMSHIP MUTUAL INSURANCE ASSOCIATION, LIMITED.

Be it known that for himself and co-owners (hereinafter called the said person or persons effecting this insurance), as well in his or their own name or names, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all, subject to the provisions hereinafter contained, doth make assurance and cause himself or themselves and them and every of them to be insured, lost or not lost, at all times and in all places as hereinafter mentioned.

Now this policy of insurance witnesseth that, in consideration of the premises and of the observance by the said insured of the rules and regulations, the A. Steamship Mutual Insurance Association, Limited, do hereby agree with the said insured that the members of the said association shall, according to the provisions of the articles of association of the said association, and the rules of the said association, and subject to the proviso hereinafter contained, be subject and liable to pay and make good, and shall pay and make good, all such losses and damages as are hereinafter expressed, which may happen to the steamship hereinafter named, and may attach to this policy in respect of the sum of pounds hereby insured, which insurance is hereby declared to be upon the steamship called the and valued as follows:—

The body, tackle, apparel, boats and other furniture of the said steamship at .... £
The machinery at ..... £
} £

Whereof is at present master, or whoever shall go for master of the said steamship, lost or not lost.

And the said association do promise and agree that the insurance aforesaid shall commence upon the said steamship at and from noon of the twentieth day of February, 1901, and shall thenceforth continue until noon of the twentieth day of February, 1902.

And touching the adventures and perils which the said association are made liable unto by this insurance they are of the seas, men of war, fire, explosion, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at

THIS POLICY IS SUBJECT TO THE SPECIAL CLAUSES AND WARRANTIES PRINTED ON BACK HEREOF.

Appendix C.

sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition or quality soever, barratry of masters and mariners, and all other perils, losses, and misfortunes that shall come to the hurt, detriment, or damage of the said steamship or any part thereof, including liability in accordance with the said rules for damage done by collision with any other ship or vessel, with liberty to tow and be towed. And in case of any loss or misfortune it shall be lawful to the insured, their factors, servants, and assigns to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said steamship, or any part thereof, without prejudice to this insurance, the charges whereof the members having ships entered in the said association shall bear in their respective proportions. And it is declared and agreed that no act of the insurers or insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. Provided always that, in accordance with the articles of association of the said association, and the rules of the said association, this policy and the other policies of the association are granted on this condition, and it is hereby specially agreed that the association, under all their policies of insurance, shall be liable in the whole only to the extent of so much of the funds as the said association is able to recover from the members of the said association and their respective heirs, executors, and administrators liable for the same, and which, under and by virtue of the articles of association, and of the rules thereof, are, for the time being, applicable for the purpose of paying claims under this and other policies issued in respect thereof.

And it is mutually agreed between the assured and the association that without prejudice to the rights and remedies of the association against the said person or persons effecting this insurance as a member or members of the association in respect of this insurance, the assured shall pay to the association, in lieu of premiums, all the sums and contributions which the association are entitled to call upon the said person or persons effecting this insurance, as a member or members of the association, to pay to the association in respect of this insurance, according to the articles of association of the A. Steamship Mutual Insurance Association, Limited, and the rules of the said association, as from time to time amended, and that the provisions contained in the said articles of association, and the rules of the association, and of all amendments thereof, shall be deemed and considered part of this policy, and shall, so far as regards this insurance, be

as binding upon the assured as upon the said person or persons effecting this insurance.

In witness whereof the common seal of the said association hath been hereunto affixed, and is authenticated by the signature of the managers of the said association, this day of 1901.

Managers.

[*At back of Policy.*]

SPECIAL CLAUSES AND WARRANTIES.

1. Warranted free of capture, seizure and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

2. [Collision clause as in institute clauses.]

3. Average payable on each valuation separately or on the whole without deduction of thirds, new for old, whether the average be particular or general. Machinery in all cases to comprise only the propelling power of the vessel. In the adjustment of claims for particular average this steamer shall be deemed to be valued at not less than 7*l.* per gross registered ton.

The following deductions shall apply to boilers, their fittings, coverings, and mountings:—

A deduction of *one-half* after the fifth year.

A deduction of *two-thirds* after the tenth year.

No claim shall be allowed for loss of or damage to donkey boilers after they are five years old.

4. Warranted free from claims for loss or injury of live stock from any cause whatever.

5. To pay general average and salvage charges as per foreign statement or York-Antwerp Rules, if in accordance with the contract of affreightment.

6. To return as follows for each consecutive thirty days the vessel may be laid up in a safe port (with or without cargo):—

Viz.:— { 6*s.* 8*d.* per cent. on the sum insured,
8*d.* per ton on tonnage entered for particular average.

Vessels laid up in port (with or without cargo) over 30 days to receive a return *pro ratâ* for the additional days.

7. Held covered in case of any breach of warranty as to cargo, trade, locality, or date of sailing, provided notice be given and

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any additional premium required be paid immediately after receipt of advices.

8. This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to, hull or machinery through the negligence of master, mariners, engineers, or pilots, or any other person or persons, whether belonging to the ship or not, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager.

9. Donkey boilers, winches, cranes, windlasses, steering gear, and electric light apparatus shall be deemed to be part of the hull, and not part of the machinery. Refrigerating machinery and insulation not covered, unless expressly included in this policy.

10. Warranted free from particular average under 4*s.* 6*d.* per gross registered ton, but nevertheless when the vessel shall have been stranded, sunk, or on fire, or in collision with any other ship or vessel, the association to pay the damage occasioned thereby. No claim shall be allowed in respect of scraping or painting the vessel's bottom, whether she be stranded or not; but the expenses of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found.

11. The warranty and conditions as to average under 4*s.* 6*d.* per gross registered ton to be applicable to each voyage as if separately insured, and not to the whole time insured, and a "voyage" shall be defined to be that period within which two cargoes are delivered, excepting where an outward or homeward passage is made in ballast, when the period shall close on the delivery of one cargo, but in any case it shall include the passage in ballast from the port of discharge to any port in the United Kingdom, or on the Continent between Bordeaux and Hamburg inclusive.

12. In no case shall the association be liable for unrepaired damage in addition to a subsequent total loss sustained during the original or extended term covered by this policy.

13. In the event of accident whereby loss or damage may result in a claim under this policy, notice shall be given in writing to the managers where practicable prior to survey, so that they may appoint a surveyor if desired. The allowance for an owner's superintendent when superintending average repairs, shall be 10*s.* 6*d.* per day when repairs are effected at the owner's

port where he carries on business or at an adjacent port, and 21*s.* per day at any other port in the United Kingdom or abroad, together with reasonable expenses.

14. Grounding in the Suez Canal, or Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Ayres) and its tributaries, or in the Danube, Demerara, or Bilbao Rivers, or on Yenikale or Bilbao Bars, shall not be deemed to be a stranding.

15. No claim for total loss, constructive or otherwise, shall be admitted unless the estimated cost of the structural repairs and of replacing the outfit and stores is equal to 80 per cent. of the value declared in this policy, although the value of the ship when repaired may be less than the cost of the repairs; and in estimating the cost of the repairs nothing shall be taken into account for recovering, saving or preserving the ship. Provided that if in any case the committee are of opinion that the liability of the association will amount to the sum insured, they shall be at liberty to pay as for a total loss, irrespective of any such estimated cost as aforesaid.

16. No British North America, except Halifax for purposes of coaling.. / No Baltic beyond 13° east longitude or White Sea ..... } Between 1st October and 1st April.

The British North America warranty may be cancelled on payment of 20*s.* per cent., but steamers entering the River St. Lawrence before 1st April or after 1st November to pay an additional 20*s.* per cent.

The Baltic warranty may be cancelled in respect of steamers in the Baltic between 1st October and 1st November on payment of 10*s.* per cent.; between 1st November and 1st April on payment of 20*s.* per cent. Such additional Baltic premium shall not exceed 20*s.* per cent. upon the policy.

The White Sea warranty may be cancelled up to the 15th October on payment of 10*s.* per cent., and after that date on payment of 40*s.* per cent.

No Mesane or Eastward of Cape Canin.

Steamers insured F.P.A. to pay two-thirds of the above rates.

APPENDIX D.

ASSOCIATION FOR THE REFORM AND CODIFICATION OF THE LAW OF NATIONS.

LIVERPOOL CONFERENCE, 1890.

YORK-ANTWERP RULES, 1890.

Rule I. Jettison of Deck Cargo.

No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

Rule II. Damage by Jettison and Sacrifice for the Common Safety.

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III. Extinguishing Fire on Shipboard.

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

Rule IV. Cutting away Wreck.

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

Rule V. Voluntary Stranding.

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

Rule VI. Carrying Press of Sail. Damage to or Loss of Sails.

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

Rule VII. Damage to Engines in Refloating a Ship.

Damage caused to machinery and boilers of a ship which is ashore and in a position of peril in endeavouring to refloat shall be allowed in general average, when shewn to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

Rule VIII. Expenses Lightening a Ship when Ashore and Consequent Damage.

When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

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Rule IX. Cargo, Ship's Materials, and Stores Burnt for Fuel.

Cargo, ship's materials, and stores, or any of them necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving shall be charged to the shipowner and credited to the general average.

Rule X. Expenses at Port of Refuge, &c.

(a) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(b) The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(c) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average.

(d) If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by

the several parties to the adventure in proportion to the extraordinary expense saved.

Rule XI. Wages and Maintenance of Crew in Port of Refuge, &c.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in Rule X., the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

Rule XII. Damage to Cargo in Discharging, &c.

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average when and only when the cost of those measures respectively is admitted as general average.

Rule XIII. Deductions from Cost of Repairs.

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz.—

In the case of **iron or steel ships**, from date of original register to the date of accident,—

Up to 1 year old (A.)	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 and 3 years (B.)	One-third to be deducted off repairs to and renewal of woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets and hawsers (other than wire and chain), awnings, covers and painting. One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, chain cables and chains, donkey engines, steam winches and connections, steam cranes and connections; other repairs in full.

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Between 3 and 6 years (C.)	Deductions as above under Clause **B**, except that one-sixth be deducted off ironwork of masts and spars, and machinery (inclusive of boilers and their mountings).
Between 6 and 10 years (D.)	Deductions as above under Clause **C**, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery (inclusive of boilers and their mountings), and all hawsers, ropes, sheets, and rigging.
Between 10 & 15 years (E.)	One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.
Over 15 years (F.)	One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.
Generally (G.)	The deductions (except as to provisions and stores, machinery, and boilers) to be regulated by the age of the ship and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

In the case of **wooden or composite ships**:—

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions:—

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

In the case of **ships generally**:—

In the case of all ships, the expense of straightening bent iron-work, including labour of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartages, use of shears, stages and graving dock materials, shall be allowed in full.

Rule XIV. Temporary Repairs.

No deductions "new for old" shall be made from the cost of temporary repairs of damage allowable as general average.

Rule XV. Loss of Freight.

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act or when the damage to or loss of cargo is so made good.

Rule XVI. Amount to be Made Good for Cargo Lost or Damaged by Sacrifice.

The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

Rule XVII. Contributory Values.

The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

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Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.

Rule XVIII. Adjustment.

Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules.

APPENDIX E.

The following are the Rules of Practice adopted by the Association of Average Adjusters, May, 1901 :—

NOTE.—Some of the undermentioned Rules are, as indicated, "Customs of Lloyd's," now by resolution of the Association incorporated amongst the Rules of Practice.

The preamble to the Customs was—

> "Nothing can be called a 'Custom of Lloyd's' which is determined by a decision of the superior Courts; for whatever is thus sanctioned rests on a ground surer than Custom. A 'Custom of Lloyd's' then must relate to a point on which the law is doubtful, or not yet defined, but as to which, for practical convenience, it is necessary that there should be some uniform rule. By the term is here understood the Customs of English Adjusting, whether as affecting General or Particular Average."

Adjustments "for the Consideration of Underwriters."

That any adjustment prepared for the consideration of underwriters shall include a statement of the reasons of the average adjuster for making such adjustment, and, when submitted in conjunction with a claim for which underwriters are liable, shall be contained in an entirely separate document. To such adjustments the following note shall be appended, viz. :—"This adjustment has been prepared by request, to enable the assured to submit the case to underwriters."

Agency Fees chargeable by Shipowners.

That neither interest nor commission (excepting bank commission), nor any other charge by way of agency or remuneration for

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trouble, is allowed to the shipowner in general average or particular average on ship, or as a special charge in respect of payments made or services rendered at the port at which the managing owner for the time being resides; excepting that a commission or agency fee is allowable in respect of payments made or services rendered on behalf of cargo, when such payments or services are not involved in the contract of affreightment.

Duty of Adjusters in respect of Cost of Repairs.

That in adjusting particular average on ship or general average which includes repairs, it is the duty of the adjuster to satisfy himself that such reasonable and usual precautions have been taken to keep down the cost of repairs as a prudent shipowner would have taken if uninsured.

Claims for Damage to Ship's Machinery.

That no claim for damage to ship's machinery shall be admitted into an adjustment unless a survey have been held upon such machinery by competent and disinterested engineers as soon as practicable after the occurrence of the casualty giving rise to the claim; a certificate of such survey, reporting as to the nature and cause of the damage, to be furnished to the adjuster: or unless clear proof be given to the adjuster that the holding of such survey or the obtaining of such certificate is impracticable, which proof is to be set forth on the face of the adjustment.

Claims on Ship's Machinery.

That in all claims on ship's machinery for repairs, no claim for a new propeller or new shaft shall be admitted into an adjustment, unless the adjuster shall obtain and insert into his statement evidence showing what has become of the old propeller or shaft.

Water Casks (*Custom of Lloyd's*, 1876).

Water casks or tanks carried on a ship's deck are not paid for by underwriters as general or particular average; nor are warps or other articles when improperly carried on deck.

General Average.

Basis of Adjustment.

That in any adjustment of general average not made in accordance with British law, it shall be prefaced on what principle or according to what law the adjustment has been made, and the reason for so adjusting the claim shall be set forth.

In all cases the adjuster shall give particulars in a prominent position in the average statement of the clause or clauses contained in the charter-party and/or bills of lading with reference to the adjustment of general average.

Deckload Jettison (Custom of Lloyd's, Amended 1890-91).

The jettison of a deckload carried according to the usage of trade, and not in violation of the contracts of affreightment, is general average.

There is an exception to this rule in the case of cargoes of cotton, tallow, acids, and some other goods.

Damage by Water used to Extinguish Fire.

That damage done by water poured down a ship's hold to extinguish a fire be treated as general average.

Damage caused by Water thrown upon Burning Goods.

That goods in a ship which is on fire, or the cargo of which is on fire, affected by water voluntarily used to extinguish such fire, shall not be the subject of general average if the packages so affected be themselves on fire at the time the water was thrown upon them.

Voluntary Stranding (Custom of Lloyd's, 1876).

The custom of Lloyd's excludes from general average all damage to ship or cargo resulting from a voluntary stranding.

This rule does not necessarily exclude such damage as is done by beaching or scuttling a burning vessel to extinguish the fire.

Expenses Lightening a Ship when Ashore (Custom of Lloyd's, as Amended 1890-91).

When a ship is ashore, and, in order to float her, cargo is put into lighters and is then at once re-shipped, the whole cost of lightering, including lighter hire and re-shipping, is general average.

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Sails set to force a Ship off the Ground (Custom of Lloyd's, 1876).

Sails damaged by being set, or kept set, to force a ship off the ground or to drive her higher up the ground for the common safety, are general average.

Stranded Vessels: Damage to Engines in getting off.

That damage caused to machinery and boilers of a stranded vessel, in endeavouring to refloat, be allowed in general average when shown to have arisen from an actual intention to float the ship at the risk of such damage.

Claims arising out of Deficiency of Fuel.

That in adjusting general average arising out of deficiency of fuel the facts on which the general average is based shall be set forth in the adjustment, including the material dates and distances, and particulars of fuel supplies and consumption.

Resort to Port of Refuge for General Average Repairs: Treatment of the Charges incurred.

That when a ship puts into a port of refuge in consequence of damage which is itself the subject of general average, and sails thence with her original cargo, or a part of it, the outward as well as the inward port charges shall be treated as general average; and when cargo is discharged for the purpose of repairing such damage, the warehouse rent and reloading of the same shall, as well as the discharge, be treated as general average. (See *Atwood* v. *Sellar*.)

Resort to Port of Refuge on account of Particular Average Repairs: Treatment of the Charges incurred.

That when a ship puts into a port of refuge in consequence of damage which is itself the subject of particular average (or not of general average), and when the cargo has been discharged in consequence of such damage, the inward port charges and the cost of discharging the cargo shall be general average, the warehouse rent of cargo shall be a particular charge on cargo, and the cost of reloading and outward port charges shall be a particular charge on freight. (See *Svendsen* v. *Wallace*.)

Treatment of Costs of Storage and Reloading at Port of Refuge.

That when the cargo is discharged for the purpose of repairing, re-conditioning or diminishing damage to ship or cargo which is itself the subject of general average, the cost of storage on it and of reloading it shall be treated as general average, equally with the cost of discharging it.

Expenses at a Port of Refuge (Custom of Lloyd's, Amended 1890-91).

When a ship puts into a port of refuge on account of accident and not in consequence of damage which is itself the subject of general average, then, on the assumption that the ship was seaworthy at the commencement of the voyage, the custom of Lloyd's is as follows:—

(a) All cost of towage, pilotage, harbour dues, and other
1876 extraordinary expenses incurred in order to bring the ship and cargo into a place of safety, are general average. Under the term "extraordinary expenses" are not included wages or victuals of crew, coals, or engine stores, or demurrage.

(b) The cost of discharging the cargo, whether for the
1876 common safety, or to repair the ship, together with the cost of conveying it to the warehouse, is general average.

The cost of discharging the cargo on account of damage to it resulting from its own *vice propre*, is chargeable to the owners of the cargo.

(c) The warehouse rent, or other expenses which take the
1876 place of warehouse rent, of the cargo when so discharged, is except as under, a special charge on the cargo.

(d) The cost of reloading the cargo, and the outward port
1876 charges incurred through leaving the port of refuge, are, when the discharge of cargo falls in general average, a special charge on freight.

(e) The expenses referred to in clause (d) are charged to
1876 the party who runs the risk of freight; that is, wholly to the charterer, if the whole freight has been prepaid; and if part only, then in the proportion which the part prepaid bears to the whole freight.

(f) When the cargo instead of being sent ashore, is placed on board hulk or lighters during the ship's stay in

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port, the hulk-hire is divided between general average, cargo, and freight, in such proportions as may place the several contributing interests in nearly the same relative positions as if the cargo had been landed and stored.

Treatment of Costs of Extraordinary Discharge.

That no distinction be drawn in practice between discharging cargo for the common safety of ship and cargo, and discharging it for the purpose of effecting at an intermediate port or ports of refuge repairs necessary for the prosecution of the voyage.

Towage from a Port of Refuge.

That if a ship be in a port of refuge at which it is practicable to repair her, and if, in order to save expense, she be towed thence to some other port; then the extra cost of such towage shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.

Cargo forwarded from a Port of Refuge.

That if a ship be in a port of refuge at which it is practicable to repair her so as to enable her to carry on the whole cargo, but, in order to save expense, the cargo, or a portion of it, be transhipped by another vessel, or otherwise forwarded; then the cost of such transhipment (up to the amount of expense saved) shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.

Interpretation of the Rule respecting Substituted Expenses.

That for the purpose of avoiding any misinterpretation of the resolution relating to the apportionment of substituted expenses, it is declared that the saving of expense therein mentioned is limited to a saving or reduction of the actual outlay, including the crew's wages and provisions, if any, which would have been incurred at the port of refuge, if the vessel had been repaired there, and does not include supposed losses or expenses, such as interest, loss of market, demurrage, or assumed damage by discharging.

Damage caused to Cargo during Forced Discharge.

That whenever the cost of discharging cargo is general average, all loss or damage necessarily arising to cargo therefrom shall be allowed in general average.

Treatment of Damage to Cargo caused by Discharge, Storing and Reloading.

The damage necessarily done to cargo by discharging, storing and reloading it, be treated as general average when, and only when, the cost of those measures respectively is so treated.

Deductions from Cost of Repairs to Iron Vessels in adjusting General Average.

That in adjusting claims for general average, repairs to iron vessels shall be subject to the following deductions in respect of "new for old," viz. :—

From Date of Original Register.

Up to 1 year old (A.)	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 & 3 years (B.)	One-third to be deducted off repairs to and renewal of boilers and their mountings, woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets, and hawsers (other than wire and chain), awnings, covers, and painting. One-sixth to be deducted off wire rigging, ropes, and hawsers, chain cables and sheets, donkey engines, steam winches, steam cranes and connections; other repairs in full.
Between 3 & 6 years (C.)	Deductions as above under Clause **B** except that one-sixth be deducted off ironwork of masts and spars, and machinery other than boilers.
Between 6 & 10 years (D.)	Deductions as above under Clause **C** except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery and all hawsers, ropes, sheets and rigging; one-sixth to be deducted off chains and cables.
After 10 years (E.)	One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing. Anchors to be allowed in full. One-sixth to be deducted off chain cables.

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Generally (F.)

The deductions (except as to provisions and stores, machinery and boilers) to be regulated by the age of the vessel, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

Freight Sacrificed: Amount to be Made Good in General Average.

That the loss of freight to be made good in general average shall be ascertained by deducting from the amount of gross freight lost, the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

Basis of Contribution to General Average.

When property saved by a general average act is injured or destroyed by subsequent accident, the contributing value of that property to a general average which is less than the total contributing value, shall, when it does not reach the port of destination, be its actual net proceeds; when it does it shall be its actual net value at the port of destination on its delivery there; and in all cases any values allowed in general average shall be added to and form part of the contributing value as above.

The above rule shall not apply to adjustments made before the adventure has terminated.

Contributory Value of Ship.

That in any adjustment of general average there shall be set forth the certificate, on which the contributory value of the ship is based, or if there be no such certificate, the information adopted in lieu thereof, and any amount made good shall be specified.

Contributory Value of Freight.

That freight at the risk of the shipowner shall contribute to general average upon its gross amount, deducting the whole of,

and no more than, such port charges as the shipowner shall incur after the date of the general average act, and such wages of the crew as the shipowner shall become liable for after that date.

That in any adjustment of general average there shall be set forth the amount of the gross freight and the freight advanced, if any; also the port charges and wages deducted, and any amount made good.

Vessel in Ballast and under Charter: Contributing Interests.

That when a vessel is in ballast and under charter, the interests contributing to expenses or sacrifices incurred for the common safety are, in practice, the ship and the freight she is earning under the charter, computed as usual in the adjustment of general average, unless the expenses are salvage expenses specifically charged by a court of law or by arbitration to the vessel without any regard to the freight.

Chartered Freight (ulterior): Contribution to General Average.

That when at the time of a general average act the vessel has on board cargo shipped under charter-party or bills of lading, and is also under a separate charter to load another cargo after the cargo then in course of carriage has been discharged, the ulterior chartered freight shall not contribute to the general average.

Deductions from Freight at Charterer's Risk.

That freight at the risk of the charterer shall be subject to no deduction for wages and port charges, except in the case of charters in which the wages or port charges are payable by the charterer, in which case such freight shall be governed by the same rule as freight at the risk of the shipowner.

Forwarding Charges on Advanced Freight.

That in case of wreck, the cargo being forwarded to its destination, the charterer, who has paid a lump sum on account of freight, which is not to be returned in the event of the vessel being lost, shall not be liable for any portion of the forwarding freight and charges, when the same are less than the balance of freight payable to the shipowner at the port of destination under the original charter-party.

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Adjustment: Policies of Insurance and Names of Underwriters.

That no statement shall be drawn up showing the amount of payments by or to the underwriters, excluding statements of particular average on ship now dealt with by rule of the association, unless the policies, or copies of policies of insurance, or certificates of insurance, for which the statement is required, be produced to the adjusters; and that such statement shall give the names of the underwriting firms and companies interested, and the amounts due on the respective policies produced.

Sacrifice for the Common Safety: Direct Liability of Underwriters.

That in case of general average sacrifice there is, under ordinary policies of insurance, a direct liability of an underwriter on ship for loss of or damage to ship's materials, and of an underwriter on goods or freight, for loss of or damage to goods or loss of freight so sacrificed as a general average loss; that such loss not being particular average is not taken into account in computing the memorandum percentages, and that the direct liability of an underwriter for such loss is consequently unaffected by the memorandum or any other warranty respecting particular average.

Enforcement of General Average Lien by Shipowners.

That in all cases where general average damage to ship is claimed direct from the underwriters on that interest, the average adjusters shall ascertain whether the shipowners have taken the necessary steps to enforce their lien for general average on the cargo, and shall insert in the average statement a note giving the result of their inquiries.

Underwriter's Liability (*Custom of Lloyd's*, 1876).

If the ship or cargo be insured for more than its contributory value, the underwriter pays what is assessed on the contributory value. But where insured for less than the contributory value, the underwriter pays on the insured value; and when there has been a particular average for damage which forms a deduction from the contributory value of the ship that must be deducted from the insured value to find upon what the underwriter contributes.

This rule does not apply to foreign adjustments, when the basis of contribution is something other than the net value of the thing insured.

The Duty of Adjusters in Cases involving Refunds of General Average Deposits or Apportionment of Salvage, Collision Recoveries, or other Funds.

That in cases of general average where deposits have been collected and it is likely that repayments will have to be made, measures be taken by the adjuster to ascertain the names of underwriters who have reimbursed their assured in respect of such deposits; that the names of any such underwriters be set forth in the adjustment as claimants of refund if any, to which they are apparently entitled; and that on completion of the adjustment, notice be sent to all underwriters whose names are so set forth as to any refund of which they appear as claimants and as to the steps to be taken in order to obtain payment of the same.

That in cases where the names of any underwriters are not to be ascertained on completion of the adjustment, notice be sent to the secretary of Lloyd's, to the Institute of London Underwriters, to the Liverpool Underwriters' Association, and to the Association of Underwriters of Glasgow, notifying such interests as have not been appropriated to underwriters.

And that in cases of apportionment of salvage or other funds for distribution, similar measures be taken by the adjuster to safeguard the interests of any underwriters who may be entitled to benefit under the apportionment.

YORK-ANTWERP RULES.

Allowance to be made in General Average under York-Antwerp Rules in respect of the Cost of Maintenance of Officers and Crew.

That the amount to be allowed in general average under York-Antwerp Rules for the maintenance of officers and crew, shall be the actual cost of such maintenance where proved; but where proof of actual cost is not furnished to the adjuster, the allowance shall be determined by the under-mentioned scale; provided that where evidence of cost is produced but is not conclusive, the allowance shall represent as nearly as possible

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the actual cost, but shall not exceed the under-mentioned scale, viz.:—

	Officers.* Per man per day.	Crew.† Per man per day.
Passenger steamers (liners)	**4/0**	**1/3**
Passenger sailing vessels	**3/0**	**1/3**
Cargo steamers and sailing vessels	**2/6**	**1/3**

except that the allowance for **Lascars** shall be **9d.** per man per day, and in the case of other **Asiatic (native) crews** shall be determined by the circumstances of each case.

* To include the master, deck officers, and engineers (in the case of a steamer), also the doctor and purser (if carried).

† To include the remainder of the ship's company.

Particular Average on Ship.

Statement of Particular Average on Ships.

That claims for particular average on ships shall not be stated unless the policies or copies of policies of insurance, for claiming on which the statement is required, be produced to the adjusters.

That such statements shall give the names of the underwriting firms and companies interested, and the amounts payable on the respective policies produced.

Apportionment of Costs in Collision Cases.

That when a vessel sustains and does damage by collision, and litigation consequently results for the purpose of testing liability, the technicality of the vessel having been plaintiff or defendant in the litigation shall not necessarily govern the apportionment of the costs of such litigation, which shall be apportioned between claim and counterclaim in proportion to the amount which has been or would have been allowed in respect of each in the event of the claim or counterclaim being established; provided that when a claim or counterclaim is made solely for the purpose of defence, and is not allowed, the costs apportioned thereto shall be treated as costs of defence.

Expenses of Removing a Vessel for Repair.

Where a vessel is in need of repair at any port and is removed thence to some other port for the purpose of repairs, either because the repairs cannot be effected, or cannot be effected prudently:—

(a) The necessary expenses incurred in moving the vessel to

the port of repair shall be allowed as part of the cost of repair, and where the vessel after repairing forthwith returns to the port from which she was removed, the necessary expenses incurred in so returning shall also be allowed.

(b) Where by moving the vessel to the port of repair any new freight is earned, or any expenses are saved in relation to the current voyage of the vessel, such net earnings or savings shall be deducted from the expenses of moving her, and where the vessel loads a new cargo at the port of repair no expenses subsequent to the completion of repair shall be allowed.

The expenses of removal include the cost of temporary repair, ballasting, wages and provisions of crew, and/or runners, pilotage, towage, extra marine insurance, port charges, and, in case of a steamer, coal and engine-room stores.

(c) This rule shall not admit any ordinary expenses incurred in fulfilment of a contract of affreightment, though such expenses are increased by the removal to a port of repair.

Coals and Stores used in Repair of Damage to the Hull.

That the cost of replacing coals and engine-room stores consumed either in the repair of damage to a steamer, in working the engines or winches to assist in the repairs of damage, or in moving her to a place of repair within the limits of the port where she is lying, shall be charged to the underwriters on ship as particular average.

Rigging chafed (*Custom of Lloyd's*, 1876).

Rigging injured by straining or chafing is not charged to underwriters, unless such injury is caused by blows of the sea, grounding, or contact; or by displacement, through sea peril, of the spars, channels, bulwarks, or rails.

Sails split or blown away (*Custom of Lloyd's*, 1876).

Sails split by the wind, or blown away while set, unless occasioned by the ship's grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent, are not charged to underwriters.

Appendix E.

Dry Dock Expenses.

That where repairs on owner's account which can only be effected in dry dock are executed concurrently with other repairs, for the cost of which the underwriters are liable, and which also can only be effected in dry dock, the cost of entering and leaving the dry dock, in addition to so much of the dock dues as is common to both repairs, shall be divided equally between the shipowner and the underwriters.

This division shall apply in those cases where a vessel is due for ordinary dry docking or for repairs on owner's account necessary for procuring or retaining her class; but it shall not apply when the shipowner has only taken advantage of the vessel being in dry dock to scrape or paint or to effect any other repairs not immediately necessary but which it may then be convenient to effect.

[At the general meeting in 1901 a probationary order was passed, by which, if confirmed in 1902, the first paragraph of the above rule will be amended, and the second paragraph deleted. See *post*, p. 1538.]

Deduction of One-third (Custom of Lloyd's, amended 1890-91).

(1876) The deduction for new work in place of old is fixed by custom at one-third, with the following exceptions:—

Anchors are allowed in full. Chain cables are subject to one-sixth only.

Metal sheathing is dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling, are subject to one-third.

The rule applies to iron as well as to wooden ships, and to labour as well as material. It does not apply to the expense of straightening bent ironwork, and to the labour of taking out and replacing it.

It does not apply to graving-dock expenses and removals, cartages, use of shears, stages and graving-dock materials.

It does not apply to a ship's first voyage.

(1890-1) N.B.—Articles belonging to, or repairs done to, a ship, other than an iron ship, allowed in general average, are subject to similar deductions in respect to new for old materials as are made in adjusting claims of particular average on ship.

Scraping and Painting.

That when, in consequence of damage by a peril insured against, a vessel's bottom has to be scraped and painted, the cost of such scraping and painting shall be charged to underwriters on ship, without any deduction on account of the vessel having become due for ordinary painting at any time subsequent to the accident.

PARTICULAR AVERAGE ON GOODS.

Adjustment on Bonded Prices (Custom of Lloyd's, 1876).

In the following cases it is customary to adjust particular average on a comparison of bonded, instead of duty-paid prices:—

In claims for damage to tea, tobacco, coffee, wine, and spirits imported into this country.

Adjustment of Average on Goods sold in Bond.

That in consequence of the facilities generally offered to bond goods at their destination, on which terms they are often sold, the term "Gross Proceeds" shall, for the purpose of adjustment, be taken to mean the price at which the goods are sold to the consumer, after payment of freight and landing charges, but exclusive of Customs duty, in cases where it is the custom of the port to sell or deal with the goods in bond.

Apportionment of Insured Value of Goods.

That where different qualities or descriptions of cargo are valued in the policy at a lump sum, such sum shall, for the purpose of adjusting claims, be apportioned on the invoice values, where the invoice distinguishes the separate values of the said different qualities or descriptions; and over the net arrived sound values in all other cases.

Under-insured Interest made good in General Average.

That an underwriter who has paid for loss by jettison of the thing insured is entitled, in the proportion that the sum insured bears to the policy value, to whatever is recovered in general average in respect to such loss, although the amount so recovered may exceed the amount paid by him.

Allowance for Water in Picked Cotton (Custom of Lloyd's, 1876).

When bales of cotton are picked, and the pickings are sold wet, the allowance for water in the pickings (where there are no means of ascertaining it) is by custom fixed at one-third.

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Allowance for Water in Cut Tobacco (*Custom of Lloyd's*, 1876).

When damaged tobacco is cut off, the allowance for water in the cuttings is one-fourth.

Allowance for Water in Wool (*Custom of Lloyd's*, 1876).

Damaged wool from Australia, New Zealand, and the Cape is subject to a deduction of 3 per cent. for wet, if the actual increase cannot be ascertained.

Franchise Charges (*Custom of Lloyd's*, 1876).

The expenses of protest, survey, and other proofs of loss, including the commission or other expenses of a sale by auction, are not admitted to make up the percentage of a claim; and are only paid by the underwriters in case the loss amounts to a claim without them.

Extra Charges (*Custom of Lloyd's*, 1876).

Extra charges payable by underwriters, when incurred at the port of destination, are recovered in full; but when charges of the same nature are incurred at an intermediate port they are subjected to the same treatment, in respect of insured and contributory values, as general average charges.

Adjustment of Return of Premium (*Custom of Lloyd's*, 1876).

When the words "and arrival" follow the stipulation for a return of premium on a policy on goods, the particular average, but not the special charges, is deducted from the amount insured to arrive at the amount on which the return is taken.

PROBATIONARY ORDER.

[The following probationary order, superseding the rule as to dry dock expenses (*ante*, p. 1536), was carried at the general meeting in 1901, and is subject to confirmation in 1902.]

DRY DOCK EXPENSES.

That where repairs on owner's account which are immediately necessary and which can only be effected in dry dock are executed concurrently with other repairs, for the cost of which the underwriters are liable, and which also can only be effected in dry dock, the cost of entering and leaving the dry dock, in addition to so much of the dock dues as is common to both repairs, shall be divided equally between the shipowner and the underwriters.

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